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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

NEW YORK STATE THRUWAY AUTHORITY,

*Petitioner*,

—v.—

FRANK MANCUSO and ELLEN MANCUSO, Individually and on behalf of their children DEANNA and THERESA MANCUSO; F. MANCUSO BOATYARD, INC., d/b/a ECHO BAY MARINA,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI


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(4 pp)

## Questions Presented

1. Whether certiorari should be granted to resolve the conflict between the decision below and other circuit court decisions on the means for determining when a single-state entity is entitled to Eleventh Amendment immunity?

2. Whether, given the confusion expressed by federal courts over the appropriate Eleventh Amendment analysis to apply to single-state entities following this Court's decision in *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994), certiorari should be granted to determine the tests to be applied and the manner of applying them when determining whether a public authority is an "arm of the State?"

## Parties

The parties to the proceeding are:

1. Frank Mancuso and Ellen Mancuso, individually and on behalf of their children, Deanna and Theresa Mancuso, and F. Mancuso Boatyard, Inc., d/b/a Echo Bay Marina, respondents;

2. The New York State Thruway Authority, petitioner.

The City of New Rochelle, New York, is a defendant in the district court action, but was not a party to the Second Circuit proceeding.

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IN THE

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OCTOBER TERM, 1996

No. __-____

NEW YORK STATE THRUWAY AUTHORITY,

*Petitioner*,

—against—

FRANK MANCUSO and ELLEN MANCUSO, Individually and on behalf of their children DEANNA and THERESA MANCUSO; F. MANCUSO BOATYARD, INC., d/b/a ECHO BAY MARINA,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

### Opinions Below

The decision of the Court of Appeals for the Second Circuit is printed in petitioner's appendix at pages 1a to 19a. It is reported at 86 F.3d 289 (June 13, 1996).

The opinion of the district court is printed in petitioner's appendix at pages 20a to 25a. It is reported at 909 F. Supp. 133 (S.D.N.Y. 1995).

## Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 13, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## Constitutional and Statutory Provisions

This case involves the Eleventh Amendment to the Constitution of the United States, which provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens, or Subjects of any foreign State.

This case also involves several provisions of the New York State Constitution, New York State Finance Law, New York Court of Claims Act, and New York Public Authorities Law, which are set out in full in petitioner's appendix at pages 26a to 113a.

## Statement of the Case

Plaintiffs brought the underlying action against the New York State Thruway Authority ("NYSTA" or "the Authority") pursuant to the federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, and New York State statutory and common law. The district court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367.

Plaintiffs have alleged, among other things, that NYSTA has unlawfully discharged pollutants into Long Island Sound via a storm drain that collects storm water runoff from a portion of the New York State Thruway. In a summary judgment motion, NYSTA claimed it was immune from suit as an arm of New York State under the Eleventh Amendment. The

district court rejected NYSTA's argument. 22a-23a; 909 F. Supp. at 135. The Second Circuit, on different reasoning, affirmed. 16a-17a; 86 F.3d at 296.

The facts material to this petition are those that relate to NYSTA's status under State law and its role in the State government. The Authority was created by the State in the early 1950's for the purpose of constructing and maintaining a State-wide highway, the New York State Thruway. The State Legislature has since expanded the Authority's mandate to include the management and maintenance of the 500-mile State canal system and certain other State roadways, and the financing of transportation projects throughout the State. N.Y. PUB. AUTH. L. §§ 350 *et seq.*

The State directs NYSTA to make specific expenditures for general State projects, relies on the Authority's credit in the bond market to raise funds for non-Thruway purposes, and takes measures to preserve the Authority's solvency. NYSTA also receives certain money through direct annual appropriations from the State legislature and statutory reimbursements.

Over the last two decades, NYSTA has been directed by the Legislature to raise capital to finance the construction, refurbishment, and maintenance of State roadways and transportation facilities. For instance, in legislation enacted at various times since 1972, the Legislature created programs for the State's transportation infrastructure which are funded through specified State tax revenue streams. N.Y. STATE FINANCE L. §§ 88-b; 89; 89-b; L.1987, c.13, § 5; L.1972, c.678, § 2; L.1991, c.329, § 1, as amended by L.1991, c.330, § 1; L.1993, c.56, § 35. The Legislature simultaneously authorized NYSTA to issue bonds, the proceeds of which are paid over to the State Department of Transportation ("DOT") or, upon DOT approval, to certain municipalities to finance the actual construction and maintenance work under agreements. In return, DOT was authorized to make payments to NYSTA from dedicated funds or legislative appropriations to cover the

principal, interest, and issuance costs of these bonds. N.Y. PUB. AUTH. L. §§ 376, 380, 385. In 1990, the Legislature amended PUB. AUTH. L. § 376 in order "[t]o assure the continued operation and solvency of the [NYSTA] by maintaining the Authority's debt reserve fund through payments from the State." L.1990, c.190, § 364, *amending* PUB. AUTH. L. § 376(5)(a)-(b). Under this provision, the State annually appropriates funds to NYSTA as may be necessary to cover the debt services on the bonds issued in support of these transportation programs. N.Y. PUB. AUTH. L. § 376(5)(a)-(b); *see also id.* at §§ 380(2)(b), 380(5), 385(2)(b), 385(5).

Similarly, in 1992 the Legislature directed that NYSTA "make available" $50 million for public works projects throughout the State, including the Syracuse inner-harbor project, the Buffalo waterfront development project, and the improvement of highway access to Stewart Airport in Orange County. N.Y. PUB. AUTH. L. § 384; L.1992, c.766. The Legislature has also directed NYSTA to assume control, operation, and maintenance of Interstate 287 and to enter into a financing agreement for the operation of that roadway conditioned on the issuance of bonds by NYSTA. L.1990, c.190, §§ 348, 350-351, 353-354.

Also in 1992, the State Legislature transferred control over the State canal system to NYSTA. L. 1992, c.766. In 1994, the Legislature authorized NYSTA to issue up to $60 million in bonds to finance the maintenance of the canal system, directed NYSTA to enhance funding for the canal, and appropriated $2.6 million to NYSTA for the maintenance and planning for the canal. N.Y. PUB. AUTH. L. §§ 382-383; L.1994, c.54, § 1 at p. 93.[1]

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[1] The construction of the canal system, the biggest public works project of its era, was financed exclusively by the State beginning in 1817. In appointing NYSTA as guardian of the Canal System, the Legislature found that NYSTA's jurisdiction over the system "will keep management and control over the canals with the state as required by the state constitution." L.1992, c.766, § 1; *see* N.Y. CONST. ART. XV(1)-(4).

At the same time that the Legislature directs NYSTA to take responsibility for various non-Thruway projects, it also allocates money directly to the Authority. In 1993, the Legislature appropriated $33 million of its federal highway funds allocation to NYSTA. L.1993, c.54, § 1 at p. 71. In 1994, NYSTA's direct appropriation was $32 million. L.1994, c.54, § 1 at p. 74. In 1995, the Legislature appropriated approximately $37 million to NYSTA. L.1995, c.54, § 1.

The Legislature draws on the Authority as a funding source for major public infrastructure projects. In 1993, the State Legislature enacted a financing plan for the State's transportation system. Under that legislation, NYSTA was authorized to issue up to $4 billion through fiscal 1996-97 in bonds for authorized state and local highway, bridge, aviation, and rail construction projects throughout the State.[2] The legislation requires NYSTA to pay over the proceeds of the bonds to the State. Meanwhile, through the annual State budget appropriation process, money is paid back to NYSTA to cover the bonds' principal and interest. N.Y. PUB. AUTH. L. §§ 385, 386; *see also Schulz v. State*, 84 N.Y.2d 231, 237-39, 616 N.Y.S.2d 343, 345-46 (1994). The Legislature has also authorized NYSTA to issue up to $40 million in special rail and aviation bonds to finance State Department of Transportation projects. N.Y. PUB. AUTH. L. § 386. The Legislature, in turn, appropriates money to pay NYSTA's debt service and certain other costs related to the financing. *Id.* at § 386(2).

Other financial inter-relationships also exist. The State Comptroller has custody over NYSTA's funds, N.Y. PUB. AUTH. L. § 364, must approve NYSTA bond issues, N.Y. PUB. AUTH. L. § 365(2), and has discretionary supervision over NYSTA's accounts, N.Y. CONST. ART. X, § 5; N.Y. PUB. AUTH. L. §§ 364, 2803. Moreover, as with the case of the

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[2] Legislation currently before the Governor for approval would, among other things, increase NYSTA's bonding authorization and extend the programs through fiscal year 1999-2000. N.Y. Assembly Bills Nos. 11336-a and 11340.

construction of the State canal a century before, New York State guaranteed $500 million in bonds for the construction of the Thruway, one of the biggest public work projects of its time. N.Y. CONST. ART. X, § 6; N.Y. PUB. AUTH. L. § 366. The last of these bonds were finally redeemed in July, 1995, two years after this litigation was commenced.

The Legislature created NYSTA to ensure the defense of the State and to promote commerce, N.Y. PUB. AUTH. L. §§ 352, 353, and the highway system built and maintained by NYSTA under this original mandate traverses almost every region of the State. The Legislature's transfer of responsibility for the 500-mile canal system and other highways to NYSTA further broadened its state-wide responsibilities.

NYSTA's governing board members are appointed by the Governor with the advice and consent of the Senate. N.Y. PUB. AUTH. L. § 352. Board members may be removed from office by the Governor and Senate as well for "inefficiency, neglect of duty or misconduct." N.Y. PUB. AUTH. L. § 2827. As discussed above, the State Comptroller disperses and may audit the Authority's funds and reviews NYSTA's proposed bond offerings. *Id.* at §§ 364 and 365(2). The Authority is required to make an annual report of its operations and financial condition to the Legislature, the Governor, the Comptroller, and the Director of the Budget. *Id.* at § 363.

NYSTA holds property "in the name of the State." N.Y. PUB. AUTH. L. § 354(4). The Legislature authorized NYSTA to acquire property through the exercise of the State's eminent domain powers. N.Y. PUB. AUTH. L. § 358-a. All of NYSTA's property will vest in the State upon the termination of the Authority's existence. *Id.* at § 352(4).

While NYSTA may sue and be sued under its governing legislation, the waiver of its sovereign immunity is limited. Thus, tort and contract claims may be brought against NYSTA only in the New York State Court of Claims and according to the same terms applicable to the State. *See* N.Y. PUB. AUTH.

L. § 361-b; N.Y. COURT OF CLAIMS ACT § 8. Furthermore, the State has structured NYSTA to exempt its property and income from State taxation. N.Y. PUB. AUTH. L. § 371. The Legislature has also exempted the bonds issued by the Authority from most State taxes. *Id.* at § 372. Similarly, the United States Internal Revenue Service views the Authority as a State entity and exempts both NYSTA's revenue and the interest paid on its bonds from federal taxation. 26 U.S.C. § 115; Appellate Record at 47.

The Authority also receives technical assistance and other services from other State agencies. N.Y. PUB. AUTH. L. § 362. Finally, the Authority's employees are protected under the State's Civil Service Law and are treated the same as employees of State departments for purposes of transfers, promotions, and seniority calculations within and among all State agencies. *Id.* at §§ 354(6) and 355.

**The Decision Below**

The Second Circuit began its analysis with reference to this Court's decisions in *Lake Country Estates, Inc. v. Lake Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), and *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994), and the various "indicators of immunity" identified in those decisions. The court recognized that there are two rationales that underpin the Eleventh Amendment—protecting the State's sovereign dignity and protecting the State's fisc. 9a-10a; 86 F.3d at 293. It then noted, however, that protection of the State's fisc will control where the indicators of immunity are evenly balanced even in the instance of a single-state entity. *Id.* The court examined six indicators: (1) how the entity is referred to; (2) how the entity's governing members are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of the local or State government; (5) whether the State has a veto power over the entity's decision; and (6) whether the

entity's obligations are binding upon the State. *Id.* After concluding that the factors were evenly balanced, the court stated that the sovereign dignity concern was "not fully implicated" because NYSTA was not a "traditional" State agency. 17a; 86 F.3d at 296. Since the State was not obligated to pay a possible judgment against the Authority, NYSTA was not entitled to Eleventh Amendment immunity. 8a-17a; 86 F.3d at 293-96.

## Reasons For Granting The Writ

### I.

The question of how to determine whether an agency like the Authority is entitled to Eleventh Amendment immunity as an arm of the State raises an important issue with respect to which the Courts of Appeals are in conflict. Unfortunately, this Court's decision in *Hess* has engendered confusion among the lower courts in dealing with single-state agencies even though the *Hess* case dealt with a bi-state, Compact Clause entity. As the Court in *Hess* observed, bi-state entities "occupy a significantly different position in our federal system than do the States themselves." 115 S.Ct. at 400. The ruling below ignored this distinction, conflicts with other circuits' analyses, and improperly restricts the State's sovereign immunity. The issue in this matter is of substantive importance because States need to know what structures of government are entitled to Eleventh Amendment immunity in order to plan and implement the most efficient forms of State government consistent with each State's policies on the assertion of sovereign immunity.[3] Consequently, the Court should

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[3] As Justice O'Connor recognized, autonomy in planning is a crucial attribute of state sovereignty. "If a State were vulnerable at any time to retroactive damage awards in federal court, its ability to set its own agenda, to control its own internal machinery, and to plan for the future—all essential perquisites of sovereignty—would be grievously impaired." *Hess*, 115 S.Ct. at 410 (O'Connor, J., dissenting).

grant certiorari to resolve the conflict and remove the lower courts' confusion.

This Court has held that the Eleventh Amendment bars suits in federal court not only against a State itself, but also against a State agency and any other governmental entity characterized as an "arm of the State." *Mt. Healthy City Sch. Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 280 (1977); *Monell v. Department of Social Services*, 436 U.S. 658, 690 n. 54 (1978). By contrast, political subdivisions of a State, such as municipalities and counties, are not entitled to Eleventh Amendment immunity "even though such entities exercise a 'slice of State power.' " *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. at 401.

In *Hess*, the Court addressed whether a subsidiary of the New York New Jersey Port Authority, a bi-state or "Compact Clause" entity, was entitled to Eleventh Amendment immunity as an "arm of the State." The *Hess* majority opinion identifies "twin" guiding concerns behind the Eleventh Amendment: (1) respect for a State's sovereign dignity; and (2) protection of a State's treasury and finances. 115 S.Ct. at 400, 404. The *Hess* opinion, however, did not address what constituted interference with a "State's sovereign dignity" because the defendant in that case was a bi-state entity and therefore suit against it did not implicate issues of "sovereign dignity." 115 S.Ct. at 400-401. Because there was no need, the Court also did not determine how to weigh the two concerns when both were implicated.

The Eleventh Amendment test applied by the Second Circuit did not respect the underpinnings of Eleventh Amendment jurisprudence which are applicable to single-state created entities. While the Second Circuit did identify two rationales that underpin the Eleventh Amendment, it then devalued one of the two—sovereign dignity—by providing that protection of the treasury "will control" in close cases. 10a; 86 F.3d at 293. This devaluation is even more ques-

tionable given the lower court's failure to acknowledge the Legislature's repeated directives to NYSTA to maintain and fund the State canals and highways, N.Y. PUB. AUTH L. §§ 376, 379-386, and the State's ability to appoint and remove NYSTA's board members, N.Y. PUB. AUTH L. §§ 352, 2827. The lower court's analysis was further marred by its inexplicable statement that NYSTA is not a "traditional" state agency—a concept that the lower court does not define or state why such a characterization is significant.

Further, the court ignored the practical interrelationships between NYSTA and the rest of State government, concluding that because the State treasury was technically not liable for most debts and other liabilities of NYSTA, there could be no impact on the public fisc. 16a; 86 F.3d at 296; *compare*, *Ristow v. South Carolina Ports Authority*, 58 F.3d 1051, 1054 (4th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 514, 133 L.Ed.2d 423 (1995). Contrary to the court's reasoning below, were plaintiffs to recoup the $105 million in damages that they claim, NYSTA's bond rating could very well be adversely affected, resulting in higher debt service and interest costs to the Authority. Furthermore, an award of such magnitude would cause significant problems for NYSTA in meeting its obligations to maintain and operate I-84 and I-287. If NYSTA's abilities were so compromised, the State would still be responsible for the mandated maintenance and operation function, which would be payable directly from the State treasury. L.1990, c.190, § 350; L. 1991, c.53, § 11; *compare Hadley v. North Arkansas Community Technical College*, 76 F.3d 1437, 1441 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3001 (June 24, 1996) (No. 95-2060) (recognizing that even if the college could initially satisfy a judgment, the judgment would produce a higher budgetary shortfall).

The Second Circuit's approach in placing primary reliance on the effect that a judgment against an agency may have on the State treasury in determining whether an agency is entitled to Eleventh Amendment Immunity is in direct conflict

with the decision of the Seventh Circuit in *Thiel v. State Bar of Wisconsin*, ___ F.3d ___, No. 95-3442, 1996 WL 496629 (7th Cir. Sept. 3, 1996), although consistent with *Christy v. Pennsylvania Turnpike Com'n.*, 54 F.3d 1140 (3d Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 340, 133 L.Ed.2d 238 (1995). It is also inconsistent with the approach of the Fourth Circuit in *Ristow v. South Carolina Ports Authority*, *supra*.

In *Thiel*, the Seventh Circuit decided that the Wisconsin State Bar was entitled to Eleventh Amendment immunity as an arm of the State. The Wisconsin Supreme Court created the Bar in 1956. It controls Bar dues and its budget through rule-making, establishing deadlines within which members must enroll and pay dues, penalties for nonpayment, and limitations on the use of dues monies. The Wisconsin Supreme Court requires the Bar to include in the dues adequate funds to pay the costs of legal education activities and professional oversight and has specified the manner in which the Bar conducts its daily business and establishes its governance. The court has ultimate authority to review amendments to the Bar's bylaws. 1996 WL 496629 at *2. The Bar, however, may sue and be sued, enter into contracts, buy or dispose of real and personal property in its own name, maintain bank accounts in its own name, and handle its own personnel matters itself. Its governing board is elected by its membership and operates the Bar without daily oversight by the court. 1996 WL 496629 at *3.

On the basis of these facts, the Seventh Circuit concluded that the Bar was entitled to Eleventh Amendment immunity. *Id.* Unlike the court below, however, the *Thiel* court did not examine what impact a judgment might have on the State treasury, instead explaining that "the effect on the State treasury was the *least important* of the three factors, and would be irrelevant if the first two weigh in favor of Eleventh Amendment immunity." 1996 WL 496629 at *3 (emphasis added), citing to *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1402 (7th Cir. 1993), *cert. denied*, ___ U.S. ___, 114

S.Ct. 2138, 128 L.Ed.2d 867 (1994). As to the other two factors—the extent of control the Wisconsin Supreme Court exercised over the Bar and whether the Bar acted as the agent of the court when it promulgated the rule in question—the Seventh Circuit concluded that sufficient control had been exercised and that the Bar was acting as an agent. As a result, the Circuit did not even "consider whether a judgment against the Bar would be satisfied by State funds." 1996 WL 496629, *3. Indeed, the Seventh Circuit did so in the face of findings of the court in *Levine v. Supreme Court of Wisconsin*, 679 F.Supp. 1478, 1487 (W.D.Wis. 1988), *rev'd on other grounds*, 864 F.2d 457 (7th Cir.), *cert. denied*, 493 U.S. 873 (1989), that the Bar was an autonomous institution and that "[a] judgment against the State Bar would not affect the state treasury." *See*, *Thiel* at 1996 WL 496629 at *7 FN3.

In contrast, the result in this case turned on whether the State was liable for a judgment against NYSTA. 15a-17a; 86 F.3d at 296. In addition, while the Seventh Circuit concluded that the supervisory oversight of the Wisconsin Supreme Court constituted "sufficient" State control over the Bar to trigger immunity, here the Second Circuit rejected that conclusion despite much greater State oversight and control in the affairs and governance of the NYSTA. 10a-16a; 86 F.3d at 295-6; *compare*, *Levine v. Supreme Court of Wisconsin*, 679 F.Supp. at 1480-82, 1487-88.

In *Ristow*, the Fourth Circuit accorded Eleventh Amendment immunity to the South Carolina Ports Authority. Instead of determining whether the State would be liable as a matter of law in the event of a judgment against the authority, the major factor utilized by the court below, the Fourth Circuit conceded that "in the strictest sense there is no legal obligation by the State of South Carolina to cover the Ports Authority's debts." 58 F.3d. at 1054. Nevertheless, the Fourth Circuit determined that the South Carolina Ports Authority was entitled to Eleventh Amendment immunity because "practicably . . . a judgment against the Ports Authority

involves the 'core concern' of the Eleventh Amendment—the ebb and flow of funds in and out of South Carolina's treasury." *Id.* at 1054-55. In conducting this "practical analysis" of the "continuing picture," the Fourth Circuit noted that South Carolina had provided funding for threnovation of port facilities, *id.* at 1053-54, and over the authority's lifetime had withdrawn funds from the authority, *id.* at 1054.[4] In contrast, despite the existence of similar factors, ranging from the initial State constitutional guarantee of $500 million in bonds, the regular infusing of monies into NYSTA, and the Legislature's reliance on the Authority as a source of funds for State projects, the court below concluded that a judgment posed "no threat" to NYSTA and rejected immunity.[5]

## II.

The need to resolve the conflict among the circuits is heightened by accelerating changes in State governmental structure that will require the courts to apply an "arm of the State" test to a multitude of state-created entities, and by the confused reaction of the lower courts to *Hess*. The lower court's emphasis on a traditional and narrow view of the State

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[4] On the issue of control the Fourth Circuit has stated "we believe that in many instances the degree of State control over the particular entity will be sufficiently clear to render the degree of control a substantively meaningful factor in the overall calculus. This is particularly true where the question is only whether the entity is only under State or local control and not which among a number of 'multiple creator-controllers' is actually in control, as is the question with compact clause entities." *Gray v. Laws*, 51 F.3d 326, 432 n. 3 (4th Cir. 1995).

[5] The import of the Second Circuit's "no threat" test is disturbing. If NYSTA has a series of poor years where the Legislature is required to infuse money into the Authority, *see, e.g.*, N.Y. PUB. AUTH. L. § 376, would NYSTA become "an arm of the State" until it recovered its fiscal stability? Would suits demanding only small judgments proceed in federal court while those demanding large amounts be barred? The opinion below is silent on these issues raised by the court's reasoning.

treasury—essentially reducing the question to whether the State must write a check against its general funds to cover the debts of the entity claiming "arm of the State" status—ignores the reality of modern State governance. The "State treasury" is no longer a single vault in the basement of the Capitol; rather, States employ numerous funds, accounts, and trusts, often interconnected, in order to finance State projects and federally-mandated programs. This restrictive view, coupled with uncertainty concerning how to evaluate the State "dignity" element of Eleventh Amendment underpinnings, contributes to the lower courts' confusion and consequent conflicting approaches and results. Indeed, giving proper weight to the State sovereignty concept would require acknowledging the immunity of many of these entities, as the preservation of the States' autonomy in organizing and financing their public undertakings must be a core concern of the Eleventh Amendment.

Here, not only has the State clothed NYSTA with many elements of the State's own identity and charged it with the execution of a state-wide public function, but the State relies on NYSTA as an integral component in the planning, financing, and implementing of state-wide transportation facilities. Thus, in a practical sense, it is impossible to view the State's funds as entirely separate and insulated from NYSTA's finances and financial condition. The test applied by the Second Circuit failed to appreciate these factors.

While *Hess* provides the lower courts with a roadmap for determining whether a bi-state entity is entitled to Eleventh Amendment immunity, the lower courts by their own admission have become confused when attempting to apply the Court's analysis to single-state creations. For example, in *Gray v. Laws*, 51 F.3d 426 (4th Cir. 1995), the Fourth Circuit characterized *Hess* as "an opinion that is certain to generate confusion." *Id.* at 431. The Fourth Circuit complained that while the *Hess* Court, which was only addressing Compact Clause entities, identified considerations the circuit

considered relevant to single-state created entities, "[The Supreme Court] did not offer any guidance as to how to apply any of the various factors in that context." *Id.* at 433.

Other circuits have also noted since *Hess* that "[t]he jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused." 8a; 86 F.2d at 293 (2d Cir.); *see, e.g., Hadley v. North Arkansas Community Technical College*, 76 F.3d at 1443 (8th Cir.) (Lay, J., dissenting) ("Today's decision amplifies the disarray of approaches applied by lower courts when confronted with the defense of Eleventh Amendment immunity by state-created entities. Little would be served by setting forth the diverse reasoning of this Court or other courts. These cases are already of historical record."); *Ristow v. South Carolina Ports Authority*, 58 F.3d at 1053 n.4 (4th Cir.) (court declines to "attempt to interpret" *Hess*' sovereignty discussion); *see Pillsbury Co. v. Port of Corpus Christi Authority*, 66 F.3d 103, 104 (5th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1705, 134 L.Ed.2d 803 (1996) (court stated that *Hess* did not apply in single-state context).

The Second Circuit's restrictive view, coupled with uncertainty concerning how to evaluate the State "dignity" element of Eleventh Amendment underpinnings recognized in *Hess* even in the bi-state context, will add to the lower courts' confusion and consequent conflicting approaches and results. Indeed, giving proper weight to the State sovereignty concept would require acknowledging the immunity of many of these entities, as the preservation of the States' autonomy in organizing and financing their public undertakings must be a core concern of the Eleventh Amendment. As Justice O'Connor stated in *Hess*, "We have always respected state flexibility in setting up and maintaining agencies charged with furthering state objectives." *Hess*, 115 S.Ct. at 411 (dissenting), citing *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937).

As a consequence, States cannot predict whether the lower courts will find that the single-state entities they have created or may create are entitled to Eleventh Amendment immunity, an important consideration in planning the structures of State government. This issue is particularly important because State governments have been compelled to diversify their functions and to develop new means of financing the programs demanded by their citizens or delegated to them by the federal government. *See*, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM.L.REV. 1243, 1247-51 (1992); *see also* L.1972, c.678, § 1 (in authorizing NYSTA to issue bonds, Legislature made finding of State financial crisis and pressing need to finance essential highway construction and repair projects).[6]

With the diversification in government structures and the increasing demands on States, courts are presented with new kinds of entities that share aspects of their creating States' identity (such as political accountability or State law immunity) and that also have varying degrees of financial relationship to their creators. Many of these entities are intentionally self-financing, despite their obvious governmental functions and State agency characteristics. Thus, given the confusion of the lower courts, their Eleventh Amendment immunity is unsettled.

For these reasons, this Court should grant certiorari to resolve the conflict and confusion in the circuits regarding the tests to apply and how they are to be applied when determining whether a single-state entity is an arm of the State.

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[6] New York is among many states that have utilized public authorities to meet the demands of modern state government. 92 COL. L. REV. at 1250 n. 32; *see Schulz v. State of New York*, 84 N.Y.2d at 241-47, 616 N.Y.S.2d at 347-51 (summarizing the history of the State's efforts to finance governmental activities through its public authorities).

## CONCLUSION

The Court should grant a writ of certiorari in this matter to resolve the conflict among the lower courts and to provide essential guidance to the lower courts when deciding whether a single-state created entity is an "arm of the State."

Dated: New York, New York
September 11, 1996

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 524—August Term 1995

(Argued November 16, 1995 Decided June 13, 1996)

Docket No. 95-7443

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FRANK MANCUSO; ELLEN MANCUSO, individually and on behalf of their children, Deanna and Theresa Mancuso; and F. MANCUSO BOAT YARD, INC., doing business as Echo Bay Marina,

*Plaintiffs-Appellees,*

—v.—

NEW YORK STATE THRUWAY AUTHORITY,

*Defendant-Appellant,*

THE CITY OF NEW ROCHELLE,

*Defendant.*

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Before:

OAKES, MAHONEY, and WALKER,

*Circuit Judges.*

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Appeal from an order of the United States District Court for the Southern District of New York (Brieant, *J.*), reported at 909 F. Supp. 133 (S.D.N.Y. 1995), which denied defendant's motion for summary judgment. Defendant New York State Thruway Authority argues that it is immune from suit under the Eleventh Amendment and that New York law bars plaintiffs' state-law claims.

Affirmed.

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JOHN A. TARTAGLIA, White Plains, NY, *for Plaintiffs-Appellees.*

JOHN J. SIPOS, New York, NY (Dennis C. Vacco, Attorney General of the State of New York, John H. Carley, Gordon J. Johnson, Elizabeth A. Grisaru, New York, NY, on the brief), *for Defendant-Appellant.*

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WALKER, *Circuit Judge*:

This appeal raises the question of whether defendant New York State Thruway Authority (the "Thruway Authority") is immune from suit in federal court under the Eleventh Amendment. The district court, in a memorandum and order, held that the Thruway Authority was not immune and denied its motion for summary judgment. *See Mancuso v. New York State Thruway Auth.*, 909 F. Supp. 133 (S.D.N.Y. 1995). The Thruway Authority now appeals, arguing that it is entitled to Eleventh

Amendment immunity under the "arm-of-the-state" doctrine. The Thruway Authority also raises several arguments based on state law, including a defense that the plaintiffs' state law causes of action are barred by New York principles of sovereign immunity.

## BACKGROUND

This dispute arises out of the Thruway Authority's ownership and use of the North Avenue Drain, a storm sewer that empties into Echo Bay in New Rochelle, New York. The plaintiffs (the "Mancusos") brought this action against the Thruway Authority and the City of New Rochelle, alleging that the defendants have violated the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, by discharging pollutants into Echo Bay through the North Avenue Drain. In addition, the plaintiffs asserted state-law causes of action for gross negligence, nuisance, strict liability, trespass and battery.

In May 1994, the defendants moved for summary judgment. The Thruway Authority argued that it was entitled to Eleventh Amendment immunity under the arm-of-the-state doctrine. The Thruway Authority and the City of New Rochelle both also contended that any discharge from the North Avenue Drain had been exempted from the Clean Water Act's permit requirements and that the district court lacked subject matter jurisdiction over the Mancusos' claims. The district court denied both motions.

On appeal, the Thruway Authority urges its Eleventh Amendment immunity defense. In addition, the Thruway Authority argues that it is entitled to sovereign immunity because the plaintiffs failed to give proper notice of this suit to the New York Attorney General. We affirm the

district court's rejection of the Eleventh Amendment and state sovereign immunity arguments. The Thruway Authority also raises several other defenses or limitations as to the Mancusos' state law causes of action, which are not reviewable at this stage of the litigation.

## DISCUSSION

### I. *Appellate Subject Matter Jurisdiction*

A federal court of appeals generally only has jurisdiction to hear appeals from those "final decisions of the district courts" that terminate an action. 28 U.S.C. § 1291. In some cases, however, the courts of appeals may hear appeals prior to the termination of an action. *See, e.g.*, 28 U.S.C. § 1292. The Supreme Court, in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), clarified that the courts of appeals also have jurisdiction under § 1291 to hear appeals from that small class of district court orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

The district court's memorandum and order is not a final decision that terminates the plaintiffs' action against the defendants, *Cohen*, 337 U.S. at 545-46, nor are we granted jurisdiction to hear an appeal from that order under any of the statutory exceptions, *see* 28 U.S.C. § 1292. Nonetheless, we have jurisdiction to hear an immediate appeal from the portion of the district court's order that denies the Thruway Authority's Eleventh Amendment claim of immunity because it falls

squarely within *Cohen*'s collateral order exception. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993); *Komlosi v. New York State Office of Mental Retardation & Developmental Disabilities*, 64 F.3d 810, 815 (2d Cir. 1995).

Furthermore, we also have jurisdiction to hear the Thruway Authority's argument that it is immune from the state law causes of action under New York law. In *Napolitano v. Flynn*, 949 F.2d 617, 621 (2d Cir. 1991), we held that we had jurisdiction to hear the appeal of several police officers who contended that they were immune from the plaintiff's state law causes of action under the Vermont law doctrine of qualified immunity. We reasoned that because the state law claim of qualified immunity, like its federal counterpart, was not "simply a defense to substantive liability," but was "an immunity from suit," it fell within the *Cohen* exception. *Id.* Here, the Thruway Authority argues that the Mancusos may not sue it because they failed to serve a copy of the complaint on the New York Attorney General, as required by § 11(a) of the New York Court of Claims Act. We find that we have jurisdiction to hear this argument because it is both "separate from the merits of the plaintiff[s'] action" and, if meritorious, would entitle the Thruway Authority not to be subject to suit. *Napolitano*, 949 F.2d at 621; *see Finnerty v. New York State Thruway Auth.*, 75 N.Y.2d 721, 722-23 (1989); *see also Blue v. Koren*, 72 F.3d 1075, 1080 n.1 (2d Cir. 1995) (order denying qualified immunity defense as a matter of law immediately appealable); *Rodriguez v. Phillips*, 66 F.3d 470, 475 (2d Cir. 1995) (same); *Hill v. City of New York*, 45 F.3d 653, 659-60 (2d Cir. 1995) (same).

We do not have jurisdiction, however, over the Thruway Authority's other defenses or limitations under

state law to the Mancusos' action that (1) the Thruway Authority cannot be liable for punitive damages, (2) it may not be subject to an injunction, and (3) it cannot be subject to trial by jury. Although these arguments may be separate from the merits of this action, the district court's failure to grant the Thruway Authority's motion for summary judgment on any of these grounds is not a decision that is "effectively unreviewable if an appeal has to await a final judgment." *Napolitano*, 949 F.2d at 621. If the district court fails to uphold these defenses in favor of the Thruway Authority and is in error in doing so, the district court's decision is eminently reviewable: we will be able to order a bench trial or to strike that part of a judgment ordering an injunction or awarding punitive damages. If review occurs in the normal course, no unremediable harm will befall the Thruway Authority. Accordingly, we do not have jurisdiction to adjudicate these defenses under the collateral order doctrine.

The Thruway Authority contends that we still may reach these issues under the doctrine of pendent appellate jurisdiction. The Supreme Court, however, has recently made clear that pendent appellate jurisdiction should be exercised sparingly, if ever, by the courts of appeals. In *Swint v. Chambers County Commission*, 115 S. Ct. 1203 (1995), the plaintiff brought suit against a county under 42 U.S.C. § 1983 and the county sought summary judgment on the ground that none of the individuals involved was a policy maker and hence the county was not liable under *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). The district court denied the county's motion, but the Eleventh Circuit, exercising pendent appellate jurisdiction, reversed. The Supreme Court vacated the Eleventh Circuit's decision on the ground that the court

of appeals lacked jurisdiction over the county's claim. *Swint*, 115 S. Ct. at 1208-12. Although the Court refused to decide when, if ever, pendent appellate jurisdiction is appropriate, it did state that there was no jurisdiction in *Swint* because the county's claim was not "inextricably intertwined" with the other issues, nor was it "necessary to ensure meaningful review" of those issues. *Id.* at 1212. In this case, the Thruway Authority's additional state law defenses are neither inextricably intertwined with, nor necessary to the resolution of, its immunity claims. Therefore, we refuse to exercise pendent appellate jurisdiction over those issues.

II. *Eleventh Amendment*

The Eleventh Amendment to the Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Although the text of the amendment speaks only of suits against a state by persons who are not citizens of that state, the Supreme Court has interpreted the Eleventh Amendment to extend to suits by all persons against a state in federal court. Thus, in *Hans v. Louisiana*, 134 U.S. 1, 10-11 (1890), the Court rejected the idea that the Eleventh Amendment allowed states, without their consent, to be sued by their own citizens in federal court. The Court noted that such a reading of the Eleventh Amendment would create an "anomalous result" that would be "no less startling and unexpected" than the Court's decision in *Chisholm v. Georgia*, 2 U.S. 419 (1793), the case that led to the adoption of the Eleventh Amendment. *Hans*, 134 U.S. at 10-11.

Of course, the Mancusos have not brought suit against the State of New York, but instead against the Thruway Authority, which was created by the state for the purpose of constructing and operating a high-speed, limited-access thruway spanning the state. The Mancusos' decision to sue the Thruway Authority and not the state is not the end of our Eleventh Amendment inquiry, but simply the beginning, for that amendment also bars some suits where "a State is not named a party to the action." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Although the Eleventh Amendment does not apply to suits against counties, municipal corporations, and other political subdivisions, the Thruway Authority is entitled to immunity if it can demonstrate that it is more like "an arm of the State," such as a state agency, than like "a municipal corporation or other political subdivision." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused. In *Feeney v. Port Authority Trans-Hudson Corporation*, 873 F.2d 628, 630-31 (2d Cir. 1989), *aff'd on other grounds*, 495 U.S. 299 (1990), we considered six factors, derived from the Supreme Court's decision in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), in deciding whether the Port Authority of New York and New Jersey (the "Port Authority"), a bistate entity created by an interstate compact between those two states, was covered by the Eleventh Amendment: (1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over

the entity's actions; and (6) whether the entity's obligations are binding upon the state.

The Supreme Court again addressed the immunity of bistate entities under the arm-of-the-state doctrine in *Hess v. Port Authority Trans-Hudson Corporation*, 115 S. Ct. 394 (1994).[1] Justice Ginsburg, writing for the Court, began by distinguishing bistate from other state-created entities because "the integrity of the compacting States [is not] compromised when the Compact Clause entity is sued in federal court." *Id.* at 401. The Court then discussed the factors that it had examined in *Lake Country*, but found that those factors did not "all point the same way." *Id.* at 402. Under these circumstances, the Court indicated that the Eleventh Amendment's twin rationales—protecting the state's fisc and dignity—"remain our prime guide." *Id.* at 404. The Court rejected the Port Authority's and the dissent's argument that the Eleventh Amendment inquiry should be determined only by looking at the degree of control that New York and New Jersey wielded over the Port Authority. *Id.*; *see also id.* at 411 (O'Connor, J., dissenting). Instead, the Court found that the Eleventh Amendment's central concern was protecting state treasuries and that, under the facts of *Hess*, the proper inquiry was "[i]f the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise?" *Id.* at 406.

Although *Hess* involved a bistate entity, we nevertheless believe that it is the proper starting place for our Eleventh Amendment inquiry in this case. *See Gray v. Laws*, 51 F.3d 426, 431 (4th Cir. 1995) ("[E]ssentially

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[1] The parties' suggestions to the contrary notwithstanding, the Supreme Court's decision in *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), does not alter our analysis here.

the same broad principles identified by the Court as relevant in the multistate entity context apply also in determining whether, within a single state, a governmental entity is 'state' or 'local' for purposes of the Eleventh Amendment."). Thus, following the Supreme Court's lead, we first look to the six *Lake Country* factors identified in *Feeney*. Only if those factors point in different directions do we then turn to the next questions: (a) will allowing the entity to be sued in federal court threaten the integrity of the state? and (b) does it expose the state treasury to risk? We remain mindful of the Supreme Court's emphasis that "the vulnerability of the State's purse [is] the most salient factor." *Hess*, 115 S. Ct. at 404. If all the elements are evenly balanced, this concern will control.

In this case, we find the six *Feeney* factors to be evenly balanced. Turning to the first factor, we note that the New York Legislature, in creating the Thruway Authority, never referred to it as a "political subdivision." *Cf. Lake Country*, 440 U.S. at 401 (bistate entity referred to in its compact as a "political subdivision"). The New York Legislature, however, declared that the Thruway Authority is "a body corporate and politic constituting a public corporation." N.Y. Pub. Auth. L. § 352(1). Thus, we look to how the New York Legislature and the New York courts have interpreted that term.

The Legislature has used the phrase "body corporate and politic" to refer to a wide variety of entities, some of which we are certain would not be found to be arms of the state. *See, e.g.*, N.Y. Pub. Auth. L. § 1120-c (Town of Clifton Park Water Authority); *id.* § 1470-b (City of Rome Parking Authority); *id.* § 1493-c (Albany Parking Authority). On the other hand, the term has also been used to refer to entities whose status under the Eleventh

Amendment is far less certain. *See, e.g., id.* § 1263(1)(a) (Metropolitan Transportation Authority); *id.* § 1677 (Dormitory Authority). This phrase does little to advance our inquiry.

The phrase "public corporation" is similarly unhelpful. Under New York law, a public corporation must be either a "municipal corporation," a "district corporation," or a "public benefit corporation." N.Y. Gen. Constr. L. § 65(b). The Thruway Authority does not seem to fit within the definition of either a municipal corporation, defined to include "a county, city, town, village and school district," N.Y. Gen. Constr. L. § 66(2), or a district corporation, defined as including "any territorial division of the state . . . whether or not such territorial division is expressly declared to be a body corporate and politic," *id.* § 66(3). Moreover, when the state legislature has meant to create a "public benefit corporation," it has usually done so in explicit terms. *See, e.g.*, N.Y. Pub. Auth. L. §§ 1120-c, 1470-b, 1493-c. Therefore, we are unable to discern what the legislature meant by using the phrase "public corporation" to describe the Thruway Authority.

New York state decisional law is also inconclusive in determining the formal status of the Thruway Authority. The Court of Appeals, in *Easley v. New York State Thruway Authority*, 1 N.Y.2d 374, 376 (1956), stated that the Thruway Authority "is an arm or agency of the State." Three years later, the Court of Appeals was more equivocal, noting that "[a]lthough created by the State . . . [the Thruway Authority is] independent and autonomous, deliberately designed to be able to function with a freedom and flexibility not permitted to an ordinary State board, department or commission" and that "there is a close relationship between the Thruway

Authority and the State." *Plumbing, Heating, Piping & Air Conditioning Contractors Ass'n v. New York State Thruway Auth.*, 5 N.Y.2d 420, 423, 424 (1959). The Appellate Division, in *Mac Farland-Breakell Building Corporation v. New York State Thruway Authority*, 104 A.D.2d 139, 141 (3d Dep't 1984), distinguished *Easley* on the ground that the Court of Appeals had not used the term "agency" as a term of art, but was "merely holding that [the Thruway Authority] performed a State function to a sufficient degree to permit the Legislature to constitutionally confer jurisdiction on the Court of Claims" over actions brought against the Thruway Authority. The Appellate Division concluded that because the Thruway Authority is a "quasi-governmental bod[y] which [was] created as [an] entit[y] separate from the State," it is not a "State agency" as that phrase is used in New York State Finance Law § 145. *Id.*; *see also Bird v. New York State Thruway Auth.*, 8 A.D.2d 495, 496-97 (4th Dep't 1959) (Thruway Authority is a public corporation and therefore not an integral part of state government).

Court of Appeals cases after *Easley* strengthen the argument that the Thruway Authority, as a public corporation or authority, is independent of the state. *See, e.g.*, *Schulz v. State*, 84 N.Y.2d 231, 246 (1994) ("[T]here can be no question that—for the purposes of contracting [its] own legally binding obligations—the Thruway Authority [is a] public corporation[ ] existing independently of the state."), *cert. denied*, 115 S. Ct. 936 (1995); *Collins v. Manhattan & Bronx Surface Transit Operating Auth.*, 62 N.Y.2d 361, 368 (1984) ("[P]ublic authorities [are] intended 'to resemble in many respects a private business corporation.' " (quoting 11 Report of Constitutional Convention Committee, 1938, p. 238)). However, these cases do not mention *Easley*, much less

overrule it. Thus, taken as a whole, New York caselaw neither plainly considers the Thruway Authority a traditional state agency nor treats it as a completely independent corporation. Because the Legislature has accorded the Thruway Authority some traditional state powers, such as immunity from taxes, N.Y. Pub. Auth. L. § 371, and the ability to acquire property by eminent domain, *id.* § 358, we think that the first *Feeney* factor tips slightly in favor of Eleventh Amendment immunity. *Cf. Hess*, 115 S. Ct. at 403 (Port Authority not labelled as a state agency but state courts have treated it as an agency and not a municipal unit or local district).

The second *Feeney* factor requires us to determine who appoints the Thruway Authority's members. This factor is easier to apply than the first, and it favors a finding of immunity: all three board members are appointed by the Governor of New York with the advice and consent of the state Senate. N.Y. Pub. Auth. L. § 352(1).

The next factor, how the Thruway Authority is funded, weighs against immunity. No provision of New York law requires the state to fund the Thruway Authority's operations and the Thruway Authority points to only two categories of evidence to support its claim that it is not self-funded: the state legislature's decision at the time of the Thruway Authority's creation to guarantee its initial bond offering, and several instances in which New York has allocated funds to the Thruway Authority. However, the arm-of-the-state doctrine focuses not on initial funding, but on current funding. *See Ristow v. South Carolina Ports Auth.*, 58 F.3d 1051, 1053 (4th Cir.), *cert. denied*, 116 S. Ct. 514 (1995). As far as we are aware, those initial bonds have long since been retired, and the state has not guaranteed any other offerings. Furthermore, each

instance in which the state has allocated funds to the Thruway Authority has involved an isolated project that the Thruway Authority took on at the behest of the state. Indeed, the limited nature of these instances of state funding establish that in general the Thruway Authority is self-funded.

The fourth factor, whether the entity's function is traditionally one of state or local government, weighs in favor of immunity. Although the construction and operation of roads and bridges may be viewed as either a state or local function, *see Hess*, 115 S. Ct. at 403, the thruway stretches across the entire state and, therefore, the Thruway Authority performs a function that a state would normally provide. The Thruway Authority also operates New York's canal system, which is a state, not a local, function.

The fifth *Feeney* factor considers whether New York State has a veto power over the Thruway Authority's actions. We have already noted, in our consideration of the second factor, that the Governor appoints and the Legislature confirms the three members of the Thruway Authority. The members are appointed for nine year terms, N.Y. Pub. Auth. L. § 352(1), and, once appointed, their actions are essentially unreviewable either by other state officers or by the Legislature. Unlike the states' relationship to the Port Authority as described in *Hess*, New York has no veto power over the Thruway Authority's actions. The Thruway Authority's only obligation to the state is to submit to the Governor, the Legislature, and several other state officials an annual report outlining its operations and fiscal condition. *See* N.Y. Pub. Auth. L. § 363. And, unlike the situation with the Port Authority, the parties have not pointed to any provision of New York law, and we are aware of none, that would

allow either the Governor or the Legislature to remove the Thruway Authority's members prior to the expiration of their terms. *See Hess*, 115 S. Ct. at 399.

The Thruway Authority contends that the fifth factor weighs in favor of immunity because under New York law the Thruway Authority is required to deposit all its receipts with the state Comptroller and may only issue bonds with the Comptroller's permission. N.Y. Pub. Auth. L. §§ 364, 365. The Court of Appeals has held, however, that the monies deposited with the Comptroller are not under the state's control, *see New York Pub. Interest Research Group, Inc. v. New York State Thruway Auth.*, 77 N.Y.2d 86, 92 (1990) ("*NYPIRG*"), and we are aware of no provision that allows the Comptroller to refuse to pay any of the Thruway Authority's debts. The New York Constitution expressly provides that the Comptroller may review the accounts of all public corporations. N.Y. Const. art. X, § 5. This power is entirely discretionary and the Comptroller has no duty to supervise any public corporation. *NYPIRG*, 77 N.Y.2d at 90-91. Similarly, we do not think that state control is evidenced by the Comptroller's responsibility to ensure fiscal responsibility by the Thruway Authority before it issues debt instruments. Accordingly, we find that the fifth *Feeney* factor weighs against finding that the Thruway Authority is covered by the Eleventh Amendment.

The final factor, whether a judgment against the Thruway Authority will place the state treasury at risk, also weighs against finding immunity. As we noted above, New York law expressly provides that "[t]he state shall be liable on notes or bonds guaranteed hereunder but shall not be liable on notes or bonds not guaranteed by the state which shall not be a debt of the state." N.Y.

Pub. Auth. L. § 369. The New York Constitution limits such guarantees to the initial construction of the thruway, *see* N.Y. Const. art. X, § 6(a), and expressly provides that the state shall not be liable for the obligations of public corporations, such as the Thruway Authority, *see id.* art. X, § 5. Thus, there can be no doubt that the state is not legally obligated to pay for the Thruway Authority's debts. *See Schulz*, 84 N.Y.2d at 247.

But our inquiry as to the sixth *Feeney* factor does not end simply because New York is not legally required to pay the Thruway Authority's debts; we must also ask whether a judgment against the Thruway Authority would have the practical effect of requiring payments from New York. *See Ristow*, 58 F.3d at 1053. The Thruway Authority has provided no evidence that it would have any difficulty in satisfying a judgment in this case, or in any other. Instead, the Thruway Authority simply speculates that if the plaintiffs were to receive all the damages they claim ($105 million), its financial stability would be threatened. But this differs little from the Port Authority's unsubstantiated claim in *Hess* that a judgment against it would adversely impact the treasuries of New York and New Jersey. 115 S. Ct. at 405. The reality is that the Thruway Authority is "structured, [like] the Port Authority is, to be self-sustaining." *Id.* Thus, we have no difficulty in concluding that any judgment against the Thruway Authority in this case poses no threat to the finances of New York.

With the six *Feeney* factors in equipoise, we turn to the two purposes underlying the Eleventh Amendment—protection against state liability and respect for state sovereignty. In this case, the state treasury is not even minimally at risk and the sole question remaining is

whether suit in federal court will be an affront to the dignity of New York State. *See Hess*, 115 S. Ct. at 401. We believe that the state sovereignty concern weighs neither in favor nor against Eleventh Amendment immunity. New York law itself provides the same kind of immunity to the Thruway Authority that it accords to the state, subjecting it only to certain tort and breach of contract claims, all of which must be brought in the Court of Claims. *See* N.Y. Pub. Auth. L. § 361-b. Allowing the Thruway Authority to be sued in federal court arguably would interfere with this carefully limited scheme for liability that New York has created. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 & n.9 (1984). The Thruway Authority, however, is not a traditional state agency, but a public entity that is generally self-funded and, except for the appointment of its members to nine-year terms, it is not under significant state control. Although the Thruway Authority may be identified closely with the state, New York State has given the Thruway Authority an existence quite independent from the state and exercises the most minimal control over the Thruway Authority. We are unable to conclude that subjecting the Thruway Authority to suit in federal court would be an affront to the dignity of New York. Because the concern for state liability weighs against a finding of immunity and because the concerns of state sovereignty and dignity are not fully implicated, we hold that the Thruway Authority is not entitled to Eleventh Amendment immunity.

Our conclusion that the Thruway Authority is not granted Eleventh Amendment immunity from suit in federal court accords with the Third Circuit's view in *Christy v. Pennsylvania Turnpike Commission*, 54 F.3d 1140 (3d Cir.), *cert. denied*, 116 S. Ct. 340 (1995), that

the Pennsylvania Turnpike Commission ("PTC") is similarly not protected by the Eleventh Amendment. There are some minor differences between the PTC and the Thruway Authority, the most significant of which is that, while the PTC did not enjoy sovereign immunity under state law, *id.* at 1148, the Thruway Authority does, *Easley*, 1 N.Y.2d at 376. This difference cuts in favor of finding immunity for the Thruway Authority. On the other hand, the Pennsylvania Secretary of Transportation is also automatically a member of the PTC's board, *Christy*, 54 F.3d at 1149, which is not the case in New York. On the whole, we do not think that these minor differences between the PTC and the Thruway Authority create any practical distinction in their status under the Eleventh Amendment. Accordingly, we affirm that part of the district court's order that denied the Thruway Authority's motion to dismiss based on Eleventh Amendment immunity.

III. *State Immunity*

The Thruway Authority repeats on appeal its argument that the Mancusos' state law claims must be dismissed because they failed to serve both their notice of claim letters and their complaint on the Attorney General. As the Thruway Authority notes, § 11(a) of the Court of Claims Act requires:

> The claim shall be filed with the clerk of the court; and, except in the case of a claim for the appropriation by the state of lands, a copy shall be served personally or by certified mail, return receipt requested, upon the attorney general within the times hereinbefore provided for filing with the clerk of the court. . . . Service by certified mail, return receipt requested, upon the attorney general shall

> not be complete until the claim or notice of intention is received in the office of the attorney general. Personal service upon the attorney general shall be made in the same manner as described in section [307] of the civil practice law and rules.

N.Y. Ct. Cl. Act § 11(a). Failure to abide by these requirements divests the Court of Claims of subject matter jurisdiction, and presumably also divests us of such jurisdiction. *See Finnerty*, 75 N.Y.2d at 723. However, § 11(c) of the Court of Claims Act provides:

> Any objection or defense based upon failure to comply with (i) the time limitations contained in section ten of this act, or (ii) the manner of service requirements set forth in subdivision a of this section is waived unless raised, with particularity, either by a motion to dismiss made before service of the responsive pleading is required or in the responsive pleading, and if so waived the court shall not dismiss the claim for such failure.

N.Y. Ct. Cl. Act § 11(c). We read this section as requiring the Thruway Authority to assert, either before or in its responsive pleading, any defense based on a plaintiff's failure to serve the Attorney General. Because the Thruway Authority's answer did not assert a defense based on § 11(a), that defense has been waived. Accordingly, we affirm the district court on this issue as well.

## CONCLUSION

For the reasons stated above, we affirm the district court's rejection of Eleventh Amendment immunity and state law immunity to the Thruway Authority and we do not decide the Thruway Authority's other defenses, which are beyond our jurisdiction.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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FRANK MANCUSO; ELLEN MANCUSO, individually and on behalf of their children, Deanna and Theresa Mancuso; and F. MANCUSO BOAT YARD, INC., doing business as Echo Bay Marina,

*Plaintiffs*,

—v.—

NEW YORK STATE THRUWAY AUTHORITY, THE CITY OF NEW ROCHELLE,

*Defendants*.

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## OPINION OF THE DISTRICT COURT

BRIEANT, *District Judge*.

This is a citizen suit brought under Section 505 of the Clean Water Act, 33 U.S.C. § 1365 ("the Act", or the CWA). Plaintiff Frank Mancuso was at relevant times the owner and operator of Echo Bay Marina in New Rochelle, New York (the "Marina"). Plaintiff Ellen Mancuso is the wife of Frank Mancuso who worked at the Marina. Plaintiffs Deanna and Theresa Mancuso are the children of Frank and Ellen Mancuso who allegedly played at the Echo Bay Marina at all times relevant to this lawsuit.

Plaintiffs allege that the defendants have unlawfully violated the Act by discharging pollutants into Echo Bay through a point source known as the "North Avenue Drain", damaging plaintiffs' property and causing physical injury. The pollutants allegedly flow into Echo Bay through the "North Avenue

Drain", a storm sewer which was constructed by and belongs to defendant New York State Thruway Authority ("NYSTA"). Plaintiffs allege further that defendant City of New Rochelle (the "City") has illegal storm and sanitary sewer connections to the North Avenue Drain which also bring pollutants into Echo Bay Marina. Plaintiffs have also pleaded supplemental claims for nuisance, trespass, negligence and intentional toxic tort. They seek monetary damages and an injunction preventing future unlawful discharges.

By motions filed May 3, 1994 and May 4, 1994 the City and NYSTA moved for summary judgment. The Court heard oral argument on June 24, 1994. NYSTA moved principally on the ground that it is an "Arm of the State" entitled to Eleventh Amendment immunity from suit in federal court. NYSTA also contends, as does the City, that it only discharged "stormwater" from the North Avenue Drain, a discharge which was exempt from the Act's permit requirement during the relevant period of this lawsuit. Both defendants also argue that plaintiffs have not complied with the Act's notice requirements, and therefore the court lacks subject matter jurisdiction, and there are other arguments made by the defendants. After careful consideration the Court denies both defendants' motions for summary judgment.

In this case the plaintiffs seek monetary damages for alleged past harm as well as prospective injunctive relief. The Eleventh Amendment prohibits a suit from being brought against a State or its agencies in federal court unless the State consents to be sued or unless Congress unequivocally abrogates the immunity. An exception to the Eleventh Amendment's grant of sovereign immunity allows a suit to be brought against the State for prospective injunctive relief of a continuing violation of federal law. *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). This Court has the jurisdiction and power to enjoin NYSTA from future violation of the CWA if at trial it is found to be in violation. Plaintiffs seek such injunctive relief to stop the pollution.

Since a non-frivolous demand for injunctive relief is sufficient to answer the Eleventh Amendment jurisdictional issue in order to dispose of this motion, it is probably not necessary for the Court to consider whether NYSTA is amenable to a damage award notwithstanding the Eleventh Amendment, if it has caused or permitted an unlawful discharge through the North Avenue Drain. Because the progress of this litigation may benefit from consideration of the issue at this time, the Court now expresses a view that damages can in fact be awarded against NYSTA upon a proper evidentiary showing at trial.

NYSTA is not the State of New York. It is merely a public authority created pursuant to statute by the State Legislature. It is governed by a board, as set forth in § 352 of the New York Public Authorities Law, consisting of members appointed for nine year terms and therefore independent of the Legislature and Governor. By § 361-b of the New York Public Authorities Law the Legislature has directed that all awards and judgments against NYSTA shall be paid out of moneys of the Authority. Accordingly, these plaintiffs, should they prevail, will receive nothing from the State treasury.

The foregoing facts concerning NYSTA are sufficient without more to resolve the issue of Eleventh Amendment immunity in favor of plaintiffs. The prior jurisprudence in the Supreme Court on the subject of the Eleventh Amendment has been recast and simplified in the recent decision of *Hess v. Port Authority Trans-Hudson Corporation*, ____ U.S. ____, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994). As is so often found in Supreme Court jurisprudence, the significance of that decision is best elicited from the dissenting opinion of Justice O'Connor:

> "[I]n place of the various factors recognized in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L Ed.2d 401 (1979), for determining arm-of-the-state status, we may now substitute a single overriding criterion, vulnerability of the state treasury. If a State does not fund judgments against

an entity, that entity is not within the ambit of the Eleventh Amendment and suits in federal court may proceed unimpeded. By the Court's reckoning, the state treasury is not implicated on these facts. Neither, it follows, is the Eleventh Amendment." *Id.* ____ U.S. at ____, 115 S.Ct. at 408.

In the instant case the State Treasury is not implicated by any awards against NYSTA, which will have to be paid out of the toll and concession revenues of its substantial highway network. Furthermore, since the governance of the Thruway is in the hands of an independent board established by the State, the "dignity of the State" discussed in passing in Hess, supra, as one of the twin reasons for Eleventh Amendment immunity is also not implicated. The dignity of NYSTA is no different than the dignity of a County government established by the State to perform a particular local function. It is well known that Counties do not enjoy Eleventh Amendment immunity. *Feeney v. Port Authority Trans-Hudson Corporation*, 873 F.2d 628, 630 (2d Cir. 1989), aff'd on other grounds, 495 U.S. 299, 110 S.Ct. 1868, 109 L.Ed.2d 264 (1990) ([t]he Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power.").

Indeed, even before the most recent assault on Eleventh Amendment immunity found in Hess, supra, this Court would find no Eleventh Amendment immunity, at least on federal question issues. *Kohlasch v. New York State Thruway Authority*, 460 F.Supp. 956 (S.D.N.Y. 1978). See also, *Zeidner v. Wulforst*, 197 F.Supp. 23 (E.D.N.Y. 1961) (Eleventh Amendment immunity available to NYSTA in a diversity suit).

Both defendants also urge the Court to dismiss the plaintiffs' CWA claims for failure to comply with the citizen suit provision of the Act which requires that citizens give notice of a claim, prior to filing suit, to the alleged violator as well as federal and state regulatory agencies. 33 U.S.C. § 1365(b). The primary purpose of the notice requirement is to inform

federal and state agencies of the claimed violation, thereby providing them with an opportunity to take their own enforcement and remedial action if so advised.

Substantial compliance with the Act's notice requirements is all that is required. *Kitlutsisti v. Arco Alaska, Inc.*, 592 F.Supp. 832 (D.C. Alaska, 1984), appeal dismissed, vacated on other grounds, 782 F.2d 800. In this case notices were sent to the regional office of the United States Environmental Protection Agency (EPA), the New York State Department of Environmental Conservation (DEC), and the defendants. The notices were adequate to provide defendants with "sufficient information to permit the recipient to identify the specific standard . . . alleged to have been violated, the activity alleged to constitute the violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice." 40 C.F.R. § 135.3(a). The first notice letters dated July 2, 1992 sent to the defendants contained a report from Materials and Environmental Technologies ("M & E"), an environmental consulting firm, describing in detail the alleged pollution discharging from the North Avenue Drain. While the subsequent formal notices of July 29, 1992 did not contain the M & E report, which is 24 pages in length, the defendants had actual notice of the specific violations alleged (discharge of specified pollutants without a permit), the person or persons responsible (the defendants), the location of the alleged violations, and that the discharge was continuous Thus, the defendants and necessary government agencies received adequate notice of the alleged violations of the Act, and the Court need not dismiss on that ground.

The Court has carefully considered the remaining arguments raised both by defendant NYSTA and the City in support of their respective motions for summary judgment. Both motions are denied. There are substantial questions of fact which prevent resolution of this case on the present submissions to the Court. By way of illustration rather than exhaustion of the voluminous record before the Court, the Court perceives the following disputed issues of fact.

First, NYSTA and the City of New Rochelle argue that there has been no violation of the Clean Water Act because the Act does not require a permit for discharges "composed entirely of stormwater." 33 U.S.C. § 1342(p). Defendants contend that the North Avenue Drain has no sanitary sewage connections and thus the discharges are entirely stormwater, substantially or entirely from the thruway. (NYSTA Memorandum in Support, p. 59) Plaintiffs deny this and assert that there are in fact direct connections of sanitary sewage into the North Avenue Drain. (Plaintiffs' Memorandum in Opposition, p. 35; Plaintiffs' Rule 3(g) statement, p. 2).

Without being able to resolve the disputed issue of whether the City has constructed or permitted illegal sanitary sewage connections to the North Avenue Drain or has permitted them to exist after notice, the Court is unable to determine whether the Clean Water Act's exemption for discharges composed entirely of stormwater is applicable. Whether this storm sewer system serves a population of more than 100,000 may also be disputed, and may determine the applicability of the CWA's § 1342(p) exceptions to the permit requirement for storm water.

The motions are denied.

SO ORDERED.

# SELECTED PROVISIONS OF THE STATE CONSTITUTION AND CERTAIN STATE STATUTES

## CONSTITUTION OF THE STATE OF NEW YORK

## ARTICLE X—CORPORATIONS

§ 5. [Public corporations; restrictions on creation and powers; accounts; obligations of]

No public corporation (other than a county, city, town, village, school district or fire district or an improvement district established in a town or towns) possessing both the power to contract indebtedness and the power to collect rentals, charges, rates or fees for the services or facilities furnished or supplied by it shall hereafter be created except by special act of the legislature.

No such public corporation (other than a county or city) shall hereafter be given both the power to contract indebtedness and the power, within any city, to collect rentals, charges, rates or fees from the owners of real estate, or the occupants of real estate (other than the occupants of premises owned or controlled by such corporation or by the state or any civil division thereof), for services or facilities furnished or supplied in connection with such real estate, if such services or facilities are of a character or nature then or formerly furnished or supplied by the city, unless the electors of the city shall approve the granting to such corporation of such powers by a majority vote at a general or special election in such city; but this paragraph shall not apply to a corporation created pursuant to an interstate compact.

The accounts of every such public corporation heretofore or hereafter created shall be subject to the supervision of the state comptroller, or, if the member or members of such public corporation are appointed by the mayor of a city, to the supervision of the comptroller of such city; provided, however, that this provision shall not apply to such a public corporation created pursuant to agreement or compact with

another state or with a foreign power, except with the consent of the parties to such agreement or compact.

Neither the state nor any political subdivision thereof shall at any time be liable for the payment of any obligations issued by such a public corporation heretofore or hereafter created, nor may the legislature accept, authorize acceptance of or impose such liability upon the state or any political subdivision thereof; but the state or a political subdivision thereof may, if authorized by the legislature, acquire the properties of any such corporation and pay the indebtedness thereof.

§ 6. [Liability of state for payment of bonds of public corporations to construct state thruways; use of state canal lands and properties by such corporation]

Notwithstanding any provision of this or any other article of this constitution, the legislature may by law, which shall take effect without submission to the people:

(a) make or authorize making the state liable for the payment of the principal of and interest on bonds of a public corporation created to construct state thruways, in a principal amount not to exceed five hundred million dollars, maturing in not to exceed forty years after their respective dates, and for the payment of the principal of and interest on notes of such corporation issued in anticipation of such bonds, which notes and any renewals thereof shall mature within five years after the respective dates of such notes; and

(b) authorize the use of any state canal lands and properties by such a public corporation for so long as the law may provide. To the extent payment is not otherwise made or provided for, the provisions of section sixteen of article seven shall apply to the liability of the state incurred pursuant to this section, but the powers conferred by this section shall not be subject to the limitations of this or any other article.

## ARTICLE XV—CANALS

### § 1. [Disposition of canals and canal properties prohibited]

The legislature shall not sell, abandon or otherwise dispose of the now existing or future improved barge canal, the divisions of which are the Erie canal, the Oswego canal, the Champlain canal, and the Cayuga and Seneca canals, or of the terminals constructed as part of the barge canal system; nor shall it sell, abandon or otherwise dispose of any portion of the canal system existing prior to the barge canal improvement which portion forms a part of, or functions as a part of, the present barge canal system; but such canals and terminals shall remain the property of the state and under its management and control forever. This prohibition shall not prevent the legislature, by appropriate laws, from authorizing the granting of revocable permits or leases for periods of time as authorized by the legislature for the occupancy or use of such lands or structures.

### § 2. [Prohibition inapplicable to lands and properties no longer useful; disposition authorized]

The prohibition of sale, abandonment or other disposition contained in section one of this article shall not apply to barge canal lands, barge canal terminals or barge canal terminal lands which have or may become no longer necessary or useful for canal or terminal purposes; nor to any canal lands and appertaining structures constituting the canal system prior to the barge canal improvement which have or may become no longer necessary or useful in conjunction with the now existing barge canal. The legislature may by appropriate legislation authorize the sale, exchange, abandonment or other disposition of any barge canal lands, barge canal terminals, barge canal terminal lands or other canal lands and appertaining structures which have or may become no longer necessary or useful as a part of the barge canal system, as an aid to navigation thereon, or for barge canal terminal purposes.

§ 3. [No tolls to be imposed; contracts for work and materials; no extra compensation]

All boats navigating the canals and the owners and masters thereof, shall be subject to such laws and regulations as have been or may hereafter be enacted concerning the navigation of the canals. The legislature shall annually make provision for the expenses of the superintendence and repairs of the canals, and may provide for the improvement of the canals in such manner as shall be provided by law notwithstanding the creation of a special revenue fund as provided in this section. All contracts for work or materials on any canal shall be made with the persons who shall offer to do or provide the same at the lowest responsible price, with adequate security for their performance as provided by law.

All funds that may be derived from any sale or other disposition of any barge canal lands, barge canal terminals, barge canal terminal lands or other canal lands and appertaining structures and any other funds collected for the use of the canals or canal lands shall be paid into a special revenue fund of the treasury. Such funds shall only be expended for the maintenance, construction, reconstruction, development or promotion of the canal, canal lands, or lands adjacent to the canal as provided by law.

§ 4. [Lease or transfer of barge canal and terminals and facilities to federal government]

Notwithstanding the prohibition of sale, abandonment or other disposition contained in section one of this article, the legislature may authorize by law the lease or transfer to the federal government of the barge canal, consisting of the Erie, Oswego, Champlain, Cayuga and Seneca divisions and the barge canal terminals and facilities for purposes of operation, improvement and inclusion in the national system of inland waterways. Such lease or transfer to the federal government for the purposes specified herein may be made upon such terms and conditions as the legislature may determine with or without compensation to the state. Nothing contained herein

shall prevent the legislature from providing annual appropriations for the state's share, if any, of the cost of operation, maintenance and improvement of the barge canal, the divisions thereof, terminals and facilities in the event of the transfer of the barge canal in whole to the federal government whether by lease or transfer.

The legislature, in determining the state's share of the annual cost of operation, maintenance and improvement of the barge canal, the several divisions, terminals and facilities, shall give consideration and evaluate the benefits derived from the barge canal for purposes of flood control, conservation and utilization of water resources.

STATE FINANCE LAW

§ 88-b. Suburban transportation fund

1. There is hereby established in the joint custody of the commissioner of taxation and finance and the comptroller a fund to be known as the "suburban transportation fund".

2. The suburban transportation fund shall consist of moneys from the commuter railroad account of the metropolitan transportation authority special assistance fund required to be paid by such authority to the suburban transportation fund pursuant to subdivision three of section twelve hundred seventy-a of the public authorities law and any moneys from the metropolitan transportation authority Dutchess, Orange and Rockland fund transferred pursuant to subdivision four of section twelve hundred seventy-a of the public authorities law.

3. Moneys in the suburban transportation fund shall be kept separate from and shall not be commingled with any other moneys in the custody of the commissioner of taxation and finance and the comptroller. All deposits of such money shall, if required by the comptroller, be secured by obligations of the United States or of the state of market value equal at all times to the amount of the deposit and all banks and trust companies are authorized to give such securities for such deposits.

4. Moneys of the fund shall be made available for financing any of the following types of capital projects within the counties comprising the metropolitan commuter transportation district, except those counties comprising the city of New York, but only to the extent that such projects are on an adopted transportation plan and approved by a designated transportation coordinating committee, if one exists, or by the metropolitan planning organization as created pursuant to section fifteen-a of the transportation law if no designated transportation coordinating committee exists: capacity and infrastructure improvements to state, county, town, city, village roads, highways, parkways and bridges; or state, county, town, city or village mass transportation projects; provided, however, that in Nassau and Suffolk counties such moneys shall be available only for capacity improvements to state roads, highways, parkways and bridges. The amount of state funds historically appropriated statewide, other than bond funds, for transportation capital purposes from other sources shall not be reduced because of the availability of such moneys made available pursuant to this chapter, nor shall such moneys be used to match federal aid. Prior to the allocation of state advance funds appropriated pursuant to this section, the municipality responsible for the project shall certify to the commissioner of transportation that the amount of funds appropriated for transportation capital purposes by that municipality shall not be reduced because of the availability of such state advance funds, and that such moneys shall not be used to match federal aid.

The designated transportation coordinating committee, if one exists, or the metropolitan planning organization if no designated transportation coordinating committee exists, shall notify the municipalities within its jurisdiction of which projects it has approved.

5. In the event that any county withdraws from the metropolitan commuter transportation district, the withdrawing county shall pay to the state comptroller any amount that is required so that the state is fully reimbursed for funds

advanced in anticipation of reimbursement from the suburban transportation fund. In the event that any withdrawing county shall fail to make a payment pursuant to this subdivision, the state comptroller shall withhold and pay to the capital projects fund an amount equal to the amount owed from the next general or specific state aid payment and scheduled to be paid to that county.

6. Moneys in the suburban transportation fund transferred pursuant to section twelve hundred seventy-a of the public authorities law shall be made available to the state department of transportation for capital projects in the counties of Nassau, Suffolk, Westchester, Putnam, Dutchess, Orange and Rockland on the basis of each county's average pro rata share of the mortgage recording tax receipts raised in such counties pursuant to subdivision one of section two hundred sixty-one of the tax law during the period January first, nineteen hundred eighty-four through December thirty-first, nineteen hundred eighty-six as certified by the metropolitan transportation authority. Moneys transferred to the suburban transportation fund at the request of Dutchess, Orange or Rockland county pursuant to subdivision three of section twelve hundred seventy-b of the public authorities law shall be used by the state department of transportation to increase the proportionate share of such capital projects in such county. Such projects shall be financed by means of a state advance to be reimbursed by the New York state thruway authority, or its successor agency, through the issuance of its bonds or notes in the manner set forth in subdivision seven of this section, or by means of a state advance to be reimbursed directly from the suburban transportation fund.

7. (a) For projects funded by the suburban transportation fund, the state department of transportation may enter into an agreement with the New York state thruway authority, or its successor agency, for the purpose of having the thruway authority, or its successor agency, issue bonds or notes to pay

the capital costs of such project. Such agreement shall be subject to approval by the director of the division of the budget.

(b) For projects funded pursuant to this subdivision, the affected municipality shall enter into an agreement with the department of transportation for the conveyance of all affected real property including highways, roads and bridges to the thruway authority, or its successor agency, for the term of the bonds or notes issued by the thruway authority, or its successor agency, for such project or for such lesser period that such bonds or notes are outstanding. During the period of such conveyance to the thruway authority, or its successor agency, the department of transportation or the municipality shall agree to maintain the facility in a state of good repair, the responsibility for which shall be with the state, or municipality, which had jurisdiction over said facility prior to such agreement.

(c) Upon the final retirement of all bonds and notes issued by the thruway authority, or its successor agency, for such purpose, such property shall automatically revert to the conveying entity.

8. Payments to the thruway authority, or its successor agency, pursuant to this section shall be subject to appropriation from the suburban transportation fund. The thruway authority, or its successor agency, shall utilize such moneys to pay the debt service on such bonds or notes and to meet administrative costs in connection therewith.

§ 89. Emergency highway reconditioning and preservation fund

1. There is hereby established in the joint custody of the commissioner of taxation and finance and the comptroller, a special account to be known as the "emergency highway reconditioning and preservation fund".

2. (a) Twenty-five percentum of the moneys received by the department of taxation and finance pursuant to the pro-

visions of section two hundred eighty-two-c and two hundred eighty-four-c of the tax law as added to such law by chapter four of the laws of nineteen hundred seventy-two after the thirtieth day of September, nineteen hundred seventy-two, shall be deposited by the commissioner of taxation and finance to the credit of the emergency highway reconditioning and preservation fund.

(b) The additional twelve and one-half per centum of the money received by the department of taxation and finance pursuant to the provisions of sections two hundred eighty-two-c and two hundred eighty-four-c of the tax law after April first, nineteen hundred ninety, shall be deposited by the commissioner of taxation and finance to the credit of the reserve account hereby established in the emergency highway reconditioning and preservation fund.

(c) The additional twelve and one-half per centum of the moneys received by the department of taxation and finance pursuant to the provisions of sections two hundred eighty-two-c and two hundred eighty-four-c of the tax law after April first, nineteen hundred ninety-one, the four and one-sixth per centum of the moneys received by the department of taxation and finance pursuant to the provisions of sections two hundred eighty-two-b and two hundred eighty-four-a of the tax law after April first, nineteen hundred ninety-one, and the additional eight and one-third per centum of the moneys received by the department of taxation and finance pursuant to such provisions on or after April first, nineteen hundred ninety-two shall be deposited by the commissioner of taxation and finance to the credit of the reserve account of the emergency highway reconditioning and preservation fund.

3. Moneys in the emergency highway reconditioning and preservation fund shall be kept separate and shall not be commingled with any other moneys in the custody of the commissioner of taxation and finance and the comptroller. All deposits of such moneys shall, if required by the comptroller, be secured by obligations of the United States or of the state

of market value equal at all times to the amount of the deposit and all banks and trust companies are authorized to give such securities for such deposits.

4. Subject to the terms of any agreement between the commissioner of transportation and the New York state thruway authority, any such moneys in the emergency highway reconditioning and preservation fund may, in the discretion of the comptroller, be invested by the comptroller in obligations of the United States or the state or obligations the principal and interest of which are guaranteed by the United States or the state.

5. The commissioner of taxation and finance and the comptroller shall at all times maintain on deposit in the emergency highway reconditioning and preservation fund the aggregate amount of money needed by the department of transportation during the next succeeding twelve calendar months to comply in full with all obligations of the department of transportation under the terms of every cooperative highway contractual agreement of the department of transportation with the New York state thruway authority, which is then in effect, including without limitation by the specification thereof, (i) the amount needed to make cooperative highway contractual agreement payments thereunder during such year, and (ii) the amount needed to establish and maintain reserves thereunder during such year; provided, however, that if the commissioner of taxation and finance has entered into an agreement with the director of the budget after April first, nineteen hundred ninety-one providing for the repayment of all or any portion of moneys transferred from the fund established by this section to the general fund during any fiscal year, and an appropriation is available from the general fund to make such repayment, the commissioner of taxation and finance and the comptroller shall not be required to maintain on deposit in the fund established by this section the amount needed by the commissioner of transportation during the next succeeding twelve months to comply with every cooperative

highway contractual agreement entered into after April first, nineteen hundred ninety-one.

6. (a) The commissioner of taxation and finance and the comptroller shall from time to time but in no event later than the last day of March, June, September and December of each year pay over and deposit to the credit of the general fund of the state of New York, all moneys in the emergency highway reconditioning and preservation fund in excess of the aggregate amount of money required to be maintained in the emergency highway reconditioning and preservation fund pursuant to subdivision five of this section. Prior to making any such transfer, the commissioner of taxation and finance and the comptroller shall make and deliver to the director of the budget, the commissioner of transportation and the New York State thruway authority a certificate stating the aggregate amount to be maintained on deposit in the emergency highway reconditioning and preservation fund to comply in full with the provisions of subdivision five of this section.

(b) Unless otherwise provided in the terms of any cooperative highway contractual agreement of the department of transportation with the New York state thruway authority entered into on or after April first, nineteen hundred ninety which is then in effect, the commissioner of taxation and finance and the comptroller shall, on dates established under the terms of any cooperative highway contractual agreement of the department of transportation with the New York state thruway authority entered into on or after April first, nineteen hundred ninety which is then in effect, pay over and deposit to the credit of the general fund of the state of New York, all moneys in the emergency highway reconditioning and preservation fund reserve account transferred thereto pursuant to paragraph (b) of subdivision five of section three hundred seventy-six of the public authorities law.

7. To secure the payment, subject to legislative appropriation, of any money due or to become due in any year under any cooperative highway contractual agreement entered into

between the commissioner of *transportation and the New York* State thruway authority, the commissioner of taxation and finance and the comptroller may pledge or assign to the New York State thruway authority, all or any moneys in the emergency highway reconditioning and preservation fund established pursuant to this section, and further, to additionally secure the payment, subject to legislative appropriation, of any money due or to become due in any year under any cooperative highway contractual agreement entered into between the commissioner of transportation and the New York State thruway authority on or after April first, nineteen hundred ninety, the commissioner of taxation and finance and the comptroller may additionally pledge or assign to the New York State thruway authority, all or any money in the emergency highway reconditioning and preservation fund reserve account established pursuant to this section, and any and all moneys which may be received by the commissioner of taxation and finance and the comptroller and credited to such emergency highway reconditioning and preservation fund and such reserve account therein in the future, and any right, title and interest of the commissioner of taxation and finance and the comptroller in and to the money in or to be deposited in such emergency highway reconditioning and preservation fund and such reserve account therein.

8. The moneys in such fund shall be appropriated and paid out on check or checks signed by the commissioner of taxation and finance and the comptroller on the certification of the chairman of the New York state thruway authority or such other officer or employee or officers or employees as such commissioner, such comptroller and such chairman shall authorize to make such requisitions.

§ 89-a. Emergency highway construction and reconstruction fund

1. There is hereby established in the joint custody of the commissioner of taxation and finance and the comptroller, a

special account to be known as the "emergency highway construction and reconstruction fund".

2. (a) Twenty-five percentum of the moneys received by the department of taxation and finance pursuant to the provisions of sections two hundred eighty-two-c and two hundred eighty-four-c of the tax law after the first day of April, nineteen hundred eighty-three, shall be deposited by the commissioner of taxation and finance to the credit of the emergency highway construction and reconstruction fund.

(b) The additional twelve and one-half per centum of the moneys received by the department of taxation and finance pursuant to the provisions of sections two hundred eighty-two-c and two hundred eighty-four-c of the tax law after April first, nineteen hundred ninety, shall be deposited by the commissioner of taxation and finance to the credit of the reserve account hereby established in the emergency highway construction and reconstruction fund.

(c) The additional twelve and one-half per centum of the moneys received by the department of taxation and finance pursuant to the provisions of sections two hundred eighty-two-c and two hundred eighty-four-c of the tax law after April first, nineteen hundred ninety-one, the four and one-sixth per centum of the moneys received by the department of taxation and finance pursuant to the provisions of sections two hundred eighty-two-b and two hundred eighty-four-a of the tax law after April first, nineteen hundred ninety-one, and the additional eight and one-third per centum of the moneys received by the department of taxation and finance pursuant to such provisions on or after April first, nineteen hundred ninety-two shall be deposited by the commissioner of taxation and finance to the credit of the reserve account of the emergency highway construction and reconstruction fund.

3. Moneys in the emergency highway construction and reconstruction fund shall be kept separate and shall not be commingled with any other moneys in the custody of the commissioner of taxation and finance and the comptroller. All

deposits of such moneys shall, if required by the comptroller, be secured by obligations of the United States or of the state of market value equal at all times to the amount of the deposit and all banks and trust companies are authorized to give such securities for such deposits.

4. Subject to the terms of any agreement between the commissioner of transportation and the New York State thruway authority, any such moneys in the emergency highway construction and reconstruction fund may, in the discretion of the comptroller, be invested by the comptroller in obligations of the United States or the state or obligations the principal and interest of which are guaranteed by the United States or the state.

5. The commissioner of taxation and finance and the comptroller shall at all times maintain on deposit in the emergency highway construction and reconstruction fund the aggregate amount of money needed by the department of transportation during the next succeeding twelve calendar months to comply in full with all obligations of the department of transportation under the terms of every cooperative highway contractual agreement of the department of transportation with the New York state thruway authority, for the design, acquisition, construction or reconstruction of state highways, state parkways, state arterial highways in cities and related facilities and structures pursuant to section three hundred seventy-six of the public authorities law, which is then in effect, including without limitation by the specification thereof, (i) the amount needed to make cooperative highway contractual agreement payments thereunder during such year, and (ii) the amount needed to establish and maintain reserves thereunder during such year; provided, however, that if the commissioner of taxation and finance has entered into an agreement with the director of the budget providing for the repayment of all or any portion of moneys transferred from the fund established by this section to the general fund during any fiscal year, and an appropriation is available from the

general fund to make such repayment, the commissioner of taxation and finance and the comptroller shall not be required to maintain on deposit in the fund established by this section the amount needed by the commissioner of transportation during the next succeeding twelve months to comply with every cooperative highway contractual agreement.

6. (a) The commissioner of taxation and finance and the comptroller shall from time to time but in no event later than the last day of March, June, September and December of each year pay over and deposit to the credit of the general fund of the state of New York, all moneys in the emergency highway construction and reconstruction fund in excess of the aggregate amount of money required to be maintained in the emergency highway construction and reconstruction fund pursuant to subdivision five of this section. Prior to making any such transfer, the commissioner of taxation and finance and the comptroller shall make and deliver to the director of the budget, the commissioner of transportation and the New York state thruway authority a certificate stating the aggregate amount to be maintained on deposit in the emergency highway construction and reconstruction fund to comply in full with the provisions of subdivision five of this section.

(b) Unless otherwise provided in the terms of any cooperative highway contractual agreement of the department of transportation with the New York state thruway authority entered into on or after April first, nineteen hundred ninety which is then in effect, the commissioner of taxation and finance and the comptroller shall, on the dates established under the terms of any cooperative highway contractual agreement of the department of transportation with the New York state thruway authority entered into on or after April first, nineteen hundred ninety which is then in effect, pay over and deposit to the credit of the general fund of the state of New York, all moneys in the emergency highway construction and reconstruction fund reserve account transferred thereto pursuant to paragraph (b) of subdivision five of section three hundred seventy-six of the public authorities law.

7. To secure the payment, subject to legislative appropriation, of any money due or to become due in any year under any cooperative highway contractual agreement entered into between the commissioner of transportation and the New York state thruway authority, the commissioner of taxation and finance and the comptroller may pledge or assign to the New York State thruway authority, all or any moneys in the emergency highway construction and reconstruction fund established pursuant to this section, and further, to additionally secure the payment, subject to legislative appropriation, of any money due or to become due in any year under any cooperative highway contractual agreement entered into between the commissioner of transportation and the New York State thruway authority on or after April first, nineteen hundred ninety, the commissioner of taxation and finance and the comptroller may additionally pledge or assign to the New York state thruway authority, all or any moneys in the emergency highway construction and reconstruction fund reserve account established pursuant to this section, and any and all moneys which may be received by the commissioner of taxation and finance and the comptroller and credited to such emergency highway construction and reconstruction fund and the reserve account therein in the future, and any right, title and interest of the commissioner of taxation and finance and the comptroller in and to the money in or to be deposited in such emergency highway construction and reconstruction fund and the reserve account therein.

8. The monies in such fund shall be appropriated and paid out on check or checks signed by the commissioner of taxation and finance and the comptroller on the certification of the chairman of the New York State thruway authority or such other officer or employee or officers or employees as such commissioner, such comptroller and such chairman shall authorize to make such requisitions.

§ 89-b. Dedicated highway and bridge trust fund

1. There is hereby established in the joint custody of the state comptroller and the commissioner of taxation and finance a special fund to be known as the "dedicated highway and bridge trust fund".

2. The dedicated highway and bridge trust fund shall consist of two accounts: (a) the special obligation reserve and payment account; and (b) the highway and bridge capital account. Moneys in each account shall be kept separate and not commingled with any other moneys in the custody of the comptroller.

3. (a) The special obligation reserve and payment account shall consist of all moneys required to be deposited in the dedicated highway and bridge trust fund pursuant to the provisions of sections two hundred eighty-nine-e, three hundred one-j and five hundred fifteen of the tax law, section four hundred one of the vehicle and traffic law, and section thirty-one of this chapter which amends this sentence, and any other moneys collected therefor or credited or transferred thereto from any other fund, account or source.

(b) Moneys in the special obligation reserve and payment account shall, following appropriation by the legislature, be used to pay amounts due to the New York state thruway authority as dedicated highway and bridge trust fund cooperative agreement payments pursuant to the provisions of dedicated highway and bridge trust fund cooperative agreements entered into between the authority and the department of transportation pursuant to sections ten-e, ten-f, and ten-g of the highway law, the provisions of section three hundred eighty-five of the public authorities law, and pursuant to the provisions of this section.

(c) The comptroller is hereby authorized and directed to transfer monthly no later than the last day of each month, any moneys, if any, in excess of the aggregate amounts required to be set aside in order to meet the requirements established

in paragraph (d) of this subdivision, to the highway and bridge capital account, provided however that in no event shall such transfers occur unless and until the aggregate of all dedicated highway and bridge trust fund cooperative agreement payments certified to the comptroller for such fiscal year shall have been appropriated in accordance with the provisions of this section. Additionally, in no event shall the comptroller pay over and distribute any revenues of the fund to any person other than the New York state thruway authority if any payment required to be set aside pursuant to paragraph (b) of this subdivision has not been made to the authority on the date by which it was required to have been made pursuant to such schedule; provided, however, that no person, including such authority or the holders of its bonds or notes shall have any lien on such revenues and such agreement shall be executory only to the extent of such revenues available to the state in such fund.

(d) Upon receipt by the comptroller of a certificate or certificates from the chairperson of the New York state thruway authority submitted pursuant to section three hundred eighty-five of the public authorities law, that such authority requires a payment or payments, from the dedicated highway and bridge trust fund, the comptroller shall pay from such fund pursuant to an appropriation on or before the fifteenth day of any month preceding the payment as the chairperson thereof may direct in any such certificate, the amount or amounts so certified. The chairperson of such authority shall furnish the commissioner of taxation and finance with copies of such certificates. In order to set aside the moneys necessary to meet the amounts required on the payment date or dates herein, the comptroller shall comply with the provisions of this subdivision.

(e) Except for the purpose of meeting a dedicated highway and bridge trust fund cooperative agreement payment required pursuant to section three hundred eighty-five of the public authorities law that is due on a monthly basis or more fre-

quently, prior to transferring any moneys from the account pursuant to paragraph (c) of this subdivision, the comptroller shall set aside on a monthly basis all revenues deposited pursuant to this subdivision as received until the amount set aside is equal to, twenty percent of the interest due on such obligations on the next succeeding interest payment date multiplied by the number of months from the date of the last such payment and ten percent of the next principal installment due on such obligations multiplied by the number of months from the date of the last such principal installment where principal is due on an annual basis or twenty percent of the next principal installment due on such obligations multiplied by the number of months from the date of the last such principal installment where principal is due on a semiannual basis. For the purpose of meeting a required dedicated highway and bridge trust fund cooperative agreement payment that is due on a monthly basis or more frequently, the comptroller shall set aside all revenues deposited pursuant to subdivision two of this section as received until the amount so set aside is, in the reasonable judgment of the comptroller, sufficient to pay the required highway and bridge trust fund cooperative agreement payment on or before such payment date. In no event shall the comptroller be held liable for the failure to set aside an amount sufficient to pay the required dedicated highway and bridge trust fund cooperative agreement payment to the authority.

(f) In the event that the amount set aside by the comptroller pursuant to paragraph (e) of this subdivision is not sufficient to meet the dedicated highway and bridge trust fund cooperative agreement payments required pursuant to a certificate or certificates submitted by the chairperson pursuant to subdivision two of section three hundred eighty-five of the public authorities law, the comptroller shall immediately transfer first from the highway and bridge capital account, and then, if necessary, from the general fund to the special obligation reserve and payment account, an amount which, when combined with the amount set aside pursuant to paragraph (e) of

this subdivision, shall be sufficient to make the dedicated highway and bridge trust fund cooperative agreement payments required pursuant to such certificate or certificates. Following such an event, the comptroller shall, immediately set aside the amounts required pursuant to paragraph (e) of this subdivision, set aside and pay the next moneys received by the special obligation reserve and payment account to reimburse the general fund for moneys which were transferred to the special obligation reserve and payment account pursuant to this paragraph. Such amounts shall be set aside until the full amount of moneys transferred from the general fund shall have been set aside and any such moneys set aside shall be transferred to the general fund no later than the last day of each month.

4. The highway and bridge capital account shall consist of all moneys transferred from the special obligation reserve and payment account and any other moneys credited or transferred thereto from any other fund, account or source.

5. a. Moneys in the dedicated highway and bridge trust fund shall, following appropriation by the legislature, be utilized for: reconstruction, replacement, reconditioning, restoration, rehabilitation and preservation of highways, parkways, and bridges thereon, to restore such facilities to their intended functions; construction, reconstruction, enhancement and improvement of highways, parkways, and bridges thereon, to address current and projected capacity problems including costs for traffic mitigation activities; aviation projects authorized pursuant to section fourteen-j of the transportation law and for payments to the general debt service fund of amounts equal to amounts required for service contract payments related to aviation projects as provided and authorized by section three hundred eighty-six of the public authorities law; programs to assist small and minority and women-owned firms engaged in transportation construction and reconstruction projects, including a revolving fund for working capital loans, and a bonding guarantee assistance program in

accordance with provisions of this chapter; matching federal grants or apportionments to the state for highway, parkway and bridge capital projects; the acquisition of real property and interests therein required or expected to be required in connection with such projects; preventive maintenance activities necessary to ensure that highways, parkways and bridges meet or exceed their optimum useful life; costs of engineering and administrative services of the department of transportation, including but not limited to fringe benefits; the contract services provided by private firms in accordance with section fourteen of the transportation law; personal services and nonpersonal services, for activities including but not limited to the preparation of designs, plans, specifications and estimates; construction management and supervision activities; costs of appraisals, surveys, testing and environmental impact statements for transportation projects; expenses in connection with buildings, equipment and facilities used or useful in connection with the maintenance, operation, and repair of highways, parkways and bridges thereon; and the payment of debt service required on any bonds, notes or other obligations and related expenses for highway, parkway and bridge purposes authorized on or after the effective date of this section. Beginning with disbursements made on and after the first day of April, nineteen hundred ninety-three, moneys in such fund shall be available to pay such costs or expenses made pursuant to appropriations or reappropriations made during the state fiscal year which began on the first of April, nineteen hundred ninety-two. Beginning the first day of April, nineteen hundred ninety-three, moneys in such fund shall also be used for payments to the general debt service fund of amounts equal to amounts required for service contract payments as provided and authorized by section three hundred eighty of the public authorities law and by section eleven of chapter three hundred twenty-nine of the laws of nineteen hundred ninety-one, as amended.

b. Subject to appropriation therefor and subject to subdivision four of this section, beginning the first day of April,

nineteen hundred ninety-three, an amount of moneys in the dedicated highway and bridge trust fund, together with any other moneys legally available therefor, which is equivalent to the amount that was historically appropriated from state sources, other than proceeds from the accelerated capacity and transportation improvements of the nineties bond act, for highway, parkway and bridge purposes as enumerated in paragraph a of this subdivision shall be used to fund highway, parkway and bridge expenditures that were historically appropriated from state sources, other than proceeds from the accelerated capacity and transportation improvements of the nineties bond act, for the purposes enumerated in paragraph a of this subdivision.

6. All payments of moneys from the dedicated highway and bridge trust fund shall be made on audit and warrant of the comptroller.

§ 92-u. New York state canal system development fund

1. Pursuant to article fifteen of the state constitution, there is hereby established in the joint custody of the state comptroller and the commissioner of taxation and finance a special revenue fund to be known as the "New York state canal system development fund".

2. Such fund shall consist of all revenues received from the operation of the New York state canal system as defined in section three hundred fifty-one of the public authorities law and section two of the canal law, including payments on leases for use of canal lands, terminals and terminal lands, tolls received for lock and lift bridge passage, payments for hydroelectric easements and sales, for purchase of other abandoned canal lands, payments for any permits and leases for use of the water and lands of the system and payments for use of dry docks and other moneys made available to the fund from any other source other than a grant, loan or other intercorporate transfer of funds of the New York state thruway authority, and any income earned by, or incremental to, the

fund due to investment thereof, or any repayment of any moneys advanced by the fund.

3. Moneys in the New York state canal system development fund may be invested by the comptroller pursuant to section ninety-eight-a of this article, and any income received by the comptroller shall be added to and become a part of, and shall be used for the purposes of such fund.

4. The moneys held in or credited to the fund shall be expended for the purposes set forth in this section, and may not be interchanged or commingled with any other account or fund but may be commingled with any other fund or account for investment purposes.

5. Moneys of the fund, following appropriation by the legislature, shall be available to the New York state thruway authority and shall be expended by such authority or subsidiary corporation thereof only for the maintenance, construction, reconstruction, development or promotion of the canal system; provided, however, that in the initial years, expenditures of moneys of the fund for the development and/or promotion of the canal system shall be accorded a priority by the authority or subsidiary corporation thereof. Moneys shall be paid out of the fund by the state comptroller on certificates issued by the director of the budget.

COURT OF CLAIMS ACT

§ 8. Waiver of immunity from liability

The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article. Nothing herein contained shall be construed to affect, alter or repeal any provision of the workmen's compensation law.

§ 9. Jurisdiction and powers of the court

The court shall have jurisdiction:

1. To hear and determine all matters now pending in the said court of claims.

2. To hear and determine a claim of any person, corporation or municipality against the state for the appropriation of any real or personal property or any interest therein, for the breach of contract, express or implied, or for the torts of its officers or employees while acting as such officers or employees, providing the claimant complies with the limitations of this article. For the purposes of this act only, a real property tax lien shall be deemed to be an interest in real property.

2-a. To hear and determine a claim of any person, corporation or municipality, against the state for the torts of members of the organized militia and the employees in the division of military and naval affairs of the executive department, providing that the claim is encompassed by the waiver of immunity and assumption of liability contained in section eight-a of this chapter, and providing, further, that the claimant complies with the limitations of this article.

3. To hear and determine any claim in favor of the state against the claimant, or against his assignor at the time of the assignment.

3-a. To hear and determine the claim for damages against the state for unjust conviction and imprisonment pursuant to section eight-b of this article.

4. To render judgment in favor of the claimant or the state for such sum as should be paid by or to the state.

5. To order two or more claims growing out of the same set of facts to be tried or heard together, with or without consolidation, whenever it can be done without prejudice to a substantial right.

6. To order the interpleader of other parties known or unknown whenever necessary for a complete determination of the claim or counterclaim.

7. To provide for the perpetuation of testimony.

8. To open defaults; to vacate, amend, correct, or modify any process, claim, order or judgment, in furtherance of justice for any error in form or substance; before entry of judgment, to reopen a trial and permit submission of further evidence; to grant a new trial upon any grounds for which a new trial may be granted in the supreme court.

9. To establish rules for the government of the court and the regulation of practice therein and to prescribe the forms of procedure before it, in furtherance of the provisions of this act and not inconsistent with law, and except as otherwise provided by this act or by rules of this court or the civil practice law and rules, the practice shall be the same as in the supreme court.

9-a. To make a declaratory judgment as defined in section three thousand one of the civil practice law and rules with respect to any controversy involving the obligation of an insurer to indemnify or defend a defendant in any action pending in the court of claims, provided that the court shall have no jurisdiction to enter a judgment against an insurer pursuant to this subdivision either: (i) for money damages; or, (ii) if the insurer would otherwise have a right to a jury trial of the controversy with respect to which the declaratory judgment is sought.

10. To provide for the regular or special sessions of the court, for such terms and at such places as it may determine and to prepare the calendar of cases therefor.

11. The court and the judges shall have all of the powers necessary to carry out properly the jurisdiction granted and the duties imposed by this act.

12. To hear and determine special proceedings for the distribution of moneys deposited pursuant to subdivision (E) of section three hundred four of the eminent domain procedure law.

§ 12. Conditions of judgment

1. In no case shall any liability be implied against the state. No judgment shall be granted on any claim against the state except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity.

2. No judgment shall be awarded to any claimant on any claim which, as between citizens of the state, would be barred by lapse of time.

3. Claims shall be heard and judgments thereon rendered by one judge, provided, however, that the presiding judge may order any claim or claims to be heard or determined by more than one judge, but not more than three judges, in which event the judgments thereon shall be rendered upon the concurrence of two judges. All intermediate applications and motions may be heard and determined by one judge.

4. Before any judgment shall be rendered for appropriation of land, the value of which exceeds five thousand dollars the judge rendering or one of the judges concurring in the judgment shall view the premises affected thereby.

PUBLIC AUTHORITIES LAW

TITLE 9—NEW YORK STATE THRUWAY AUTHORITY

§ 350. Short title

This title may be cited as "New York State thruway authority act".

§ 351. Definitions

As used or referred to in this title, unless a different meaning clearly appears from the context:

1. The term "authority" shall mean the corporation created by section three hundred fifty-two of this title.

2. The term "thruway" shall mean generally a divided highway under the jurisdiction of the authority for mixed traffic with access limited as the authority may determine and generally with grade separations at intersections, and such bridges, buildings, tunnels, and other structures and facilities related thereto as the authority may determine.

3. The terms "bonds" and "notes" shall mean bonds and notes, respectively, issued by the authority pursuant to this title.

4. The term "comptroller" shall mean the comptroller of the state of New York.

5. The term "commissioner" shall mean the commissioner of transportation of the state of New York.

6. The term "municipality" shall mean a county, town, city, village, special district or other political subdivision.

7. The term "highway" shall mean a public road or parkway, maintained by the state or a municipality.

8. The term "real property" shall mean lands, waters, rights in lands or waters, structures, franchises and interests in land, including lands under water, riparian rights, property rights in air space and/or subsurface space and any and all other things and rights usually included within the said term and includes also any and all interests in such property less than full title, such as easements permanent or temporary, rights-of-way, uses, leases, licenses and all other incorporeal hereditaments and every estate, interest or right legal or equitable.

9. The term "state" shall mean the state of New York.

10. The term "New York state canal system" shall mean all of the canals, canal lands, feeder canals, reservoirs, canal terminals, canal terminal lands and other property under the jurisdiction of the authority pursuant to article one-A of the canal law.

11. The term "Tappan Zee ferry service" shall mean a high speed ferry service for use by commuters and others between Rockland county, Westchester county and the city of New York. It shall include all real property, buildings, terminals, vessels, structures and other facilities related thereto as the authority may determine.

12. The term "thruway system" shall mean: (a) the thruway; (b) the New York state canal system; and (c) the Tappan Zee ferry service.

§ 352. New York State thruway authority

1. A board to be known as "New York state thruway authority" is hereby created. Such board shall be a body corporate and politic constituting a public corporation. It shall consist of three members appointed by the governor by and with the advice and consent of the senate. The members first appointed shall serve for terms ending three, six and nine years, respectively from January first next succeeding their appointment. Their successors shall be appointed for terms of nine years each. A member to be designated as chairman in his or her appointment as a member shall be chairman of such board until his or her term as member expires. The chairman and the other members shall serve without salary or other compensation, but shall be entitled to reimbursement for their actual and necessary expenses incurred in the performance of their official duties. The chairman shall be the chief executive officer of the authority and shall be primarily responsible for the discharge of the administrative functions of the authority.

2. Notwithstanding any inconsistent provisions of law, general, special or local, no officer or employee of the state, or of any civil division thereof, shall be deemed to have forfeited

or shall forfeit his office or employment by reason of his acceptance of membership on the board created by this section; provided, however, a member who holds such other public office or employment shall receive no additional compensation for services rendered pursuant to this title.

3. The power of such corporation shall be vested in and exercised by a majority of the members of the board then in office. Such board may delegate to one or more of its members or its officers, agents and employees such powers and duties as it may deem proper.

4. Such board and its corporate existence shall continue so long as it shall have notes, bonds or other obligations outstanding (including notes, bonds or obligations hereafter issued or incurred) and until its existence shall be terminated by law. Upon the termination of the existence of the authority, all its rights and properties shall pass to and be vested in the state.

§ 353. Purposes of the authority and benefits therefrom

The authority is created to and shall have power to finance, construct, reconstruct, improve, develop, maintain or operate a thruway system as provided by and subject to the provisions of this title together with facilities for the public incidental thereto. It is hereby found and declared that such purposes are in all respects for the benefit of the people of the state of New York for the increase of their pleasure, convenience and welfare, for the improvement of their health, to facilitate transportation for their recreation and commerce and for the common defense; and the authority shall be regarded as performing a governmental function in carrying out its corporate purpose and in exercising the powers granted by this title.

§ 354. Powers of the authority

Except as otherwise limited by this title, the authority shall have power

1. To sue and be sued;

2. To have a seal and to alter the same at pleasure;

3. To acquire, hold and dispose of personal property for its corporate purposes;

4. To acquire and hold in the name of the state by purchase or appropriation real property or rights or easements therein and to sell, exchange, or otherwise dispose of any real property not necessary for its corporate purposes or whenever the board shall determine that it is in the interest of the authority; and upon such terms and conditions and uses as the board shall determine, to lease or to grant permits to occupy real property not presently required for thruway purposes but held for future use in carrying out its corporate purposes;

5. To make by-laws for its organization and internal management and, subject to agreements with noteholders or bondholders, rules and regulations governing the use of the thruways and all other properties and facilities under its jurisdiction, which shall be filed with the department of state in the manner provided by section one hundred two of the executive law;

6. To appoint officers, agents and employees and fix their compensation; subject however to the provisions of the civil service law, which shall apply to the authority and to the subsidiary corporation thereof as a municipal corporation other than a city;

7. To make contracts, and to execute all instruments necessary or convenient;

8. Subject to agreements with noteholders or bondholders, to fix and collect such fees, rentals and charges for the use of the thruway system or any part thereof necessary or convenient, with an adequate margin of safety, to produce sufficient revenue to meet the expense of maintenance and operation and to fulfill the terms of any agreements made with the holders of its notes or bonds, and to establish the rights and priv-

ileges granted upon payment thereof; provided, however, that tolls may only be imposed for the passage through locks and lift bridges by vessels which are propelled in whole or in part by mechanical power; and provided further that no tolls shall be imposed or collected prior to the first day of April, nineteen hundred ninety-three.

9. To retain and employ private consultants on a contract basis for rendering professional and technical assistance and advice;

10. To construct, reconstruct or improve on or along the thruway system in the manner herein provided, suitable facilities for gas stations, restaurants, and other facilities for the public, or to lease the right to construct, reconstruct or improve and operate such facilities; such facilities shall be publicly offered for leasing for operation, or the right to construct, reconstruct or improve and operate such facilities shall be publicly offered under rules and regulations to be established by the authority, provided, however, that lessees operating such facilities at the time this act becomes effective, may reconstruct or improve them or may construct additional like facilities, in the manner and upon such terms and conditions as the board shall determine; and provided further, however, that such facilities constructed, reconstructed or improved on or along the canal system shall be consistent with the canal recreationway plan approved pursuant to section one hundred thirty-eight-c of the canal law and section three hundred eighty-two of this title;

11. To construct and maintain over, under, along or across a thruway under its jurisdiction telephone, telegraph, television, electric power and other wires or cables, pipe lines, water mains and other conduits and mechanical equipment, not inconsistent with the appropriate use of the thruways, or to contract for such construction; and upon such terms and conditions as the board shall determine, to lease all or any part of such property and facilities or the right to use the same, whether such facilities are constructed by the authority

or under a contract for such construction, or to lease the right to construct and use such facilities or to grant permits or easements for such purposes to any governmental agency of the state of New York or to any public corporation, or to the United States of America or any governmental agency thereof for any public purposes or to individuals, partnerships and corporations, provided, however, that no lease or renewal thereof shall be granted for a period of more than twenty-years from the date when such lease is made;

12. To borrow money and issue negotiable notes, bonds or other obligations and to provide for the rights of the holders thereof;

13. To enter on any lands, waters, or premises for the purpose of making borings, soundings, and surveys;

14. To accept any gifts or any grant of funds or property from the federal government or from the state of New York or any other federal or state public body or political subdivision or any other person and to comply with the terms and conditions thereof;

15. To do all things necessary or convenient to carry out its purposes and exercise the powers expressly given in this title.

§ 355. Officers and employees; transfer, promotion and seniority

1. Officers and employees of state departments, agencies, and the canal corporation may be transferred to the authority and officers, agents and employees of the authority may be transferred to state departments, agencies, and the canal corporation, without examination and without loss of any civil service status or rights. No such transfer may, however, be made except with the approval of the head of the state department or division involved and the director of the budget and the chairman of the authority and in compliance with the rules and regulations of the state civil service commission.

2. Promotions from positions in state departments and agencies to positions in the authority, and vice versa, may be made from interdepartmental promotion lists resulting from promotion examinations in which both employees of the authority and employees of the state are eligible to participate.

3. In computing seniority for purposes of promotion or for purposes of suspension or demotion upon the abolition of positions in the service of the authority or in the service of the state, in the case of an employee of the authority a period of prior employment in the service of the state shall be counted in the same manner as though such period of employment had been in the service of the authority, and in the case of an employee of the state a period of prior employment in the service of the authority shall be counted in the same manner as though such period of employment had been in the service of the state. For the purposes of the establishment and certification of preferred lists, employees suspended from the authority shall be eligible for reinstatement in the service of the state, and employees suspended from the service of the state shall be eligible for reinstatement in the service of the authority, in the same manner as though the authority were a department of the state.

§ 356. Thruway sections and connections; assuming jurisdiction

At any time after this title shall become effective the authority may adopt a resolution assuming jurisdiction for its corporate purposes of any or all of the thruway sections or connections below described and such connections with highways, hereinafter referred to as "highway connections," as the authority may deem advisable in the interest of the public to serve traffic needs, and the authority shall continue to have such jurisdiction so long as its corporate existence shall continue.

Pending the adoption of such resolution, the commissioner shall have all the powers herein conferred upon the authority to construct, reconstruct, improve, maintain, and operate such thruway sections and connections, and highway connections, and to acquire in the name of the state real property therefor. Subject to such deviations therefrom as the authority may deem advisable in the interest of the public to serve traffic needs, such thruway sections and connections shall be as follows:

1. Southern Westchester connection. Beginning at the northerly terminus of the Major Deegan expressway in the vicinity of Jerome avenue at the New York city corporate line, thence extending in a general northerly direction through the city of Yonkers to connect with the southerly end of the Hudson section at a point in the vicinity of Tuckahoe road to be determined by the commissioner. No fees or other charges may be imposed for vehicular use of this connection.

2. The Hudson section. Beginning at the northerly end of the southern Westchester connection at or near Tuckahoe road, thence in a general northerly and westerly direction crossing the Hudson river at a point south of Highland Falls, which crossing shall be known as "The Governor Malcolm Wilson Tappan Zee Bridge", including a highway connection between "The Governor Malcolm Wilson Tappan Zee Bridge" and the New England section of the thruway presently known as interstate route two hundred eighty-seven, thence in a general westerly direction to intersect with existing route number seventeen or to a connection with that route, including a thruway connection from that portion of the section west of the Hudson river, generally southerly to a point to be determined by the authority on the New York-New Jersey boundary line.

3. The Catskill section. Beginning at the northerly end of the Hudson section, extending in a general northerly direction in the vicinity of Central Valley, Highland Mills, Woodbury

Falls, Vails Gate, thence through or passing Newburgh on the west, including a highway connection which runs from the Pennsylvania line at Port Jervis to the Connecticut border east of Brewster, presently known as interstate route 84, except for that portion of the highway connection between the interchange with the easternmost state highway on the west shore of the Hudson river (currently designated state touring route 9W) and the interchange with the westernmost state highway on the east shore of the Hudson river (currently designated state touring route 9D) which is subject to the jurisdiction of the New York state bridge authority, thence northerly past Plattekill and New Paltz, thence passing through or near the city of Kingston and continuing northerly to the west of Saugerties and Catskill, continuing northerly passing in the vicinity of West Coxsackie and Ravena, thence northerly passing the Feura Bush railroad yards in the vicinity of either their easterly or westerly extremities, thence continuing northerly passing to the west or through the westerly part of the city of Albany, and intersecting United States route number twenty in the vicinity of McKownville.

4. The Mohawk section. Starting at the northerly end of the Catskill section on United States route number twenty in the vicinity of McKownville, continuing in a northwesterly direction toward the city of Schenectady, and thence around the southerly side of Schenectady, continuing through or along the Mohawk Valley by-passing or passing through the city of Utica, thence westerly passing in the vicinity of Whitesboro and continuing to the north of the city of Oneida, thence westerly to the south of the Cicero swamp to a point on United States route number eleven north of the village of Liverpool.

5. The Ontario section. Starting at the westerly end of the Mohawk section at a point on United States route number eleven north of the village of Liverpool, thence westerly north of Onondaga lake, thence in a westerly direction passing in the vicinities of Warners, Memphis, Jordan and Weedsport, crossing the New York Central and West Shore railroads in

the vicinity of the village of Port Byron, thence southwesterly crossing the Seneca river in the vicinity of May's Point, thence westerly north of the villages of Seneca Falls and Waterloo and passing in the vicinities of West Junius, Phelps, Clifton Springs and Manchester, passing north of Victor and in the vicinity of Fisher and Severance, continuing westerly to a point in the vicinity of the city of Batavia, thence westerly to a point in the vicinity of Williamsville, including a spur to Main street, in the vicinity of Kensington Avenue in the town of Amherst, thence southerly generally parallel to and west of Union road to a point south of the Lehigh Valley railroad tracks, thence southwesterly to a point at the junction of the Erie and Niagara sections in the vicinity of the crossing of Dingens street and the Lehigh Valley railroad in the town of Cheektowaga.

6. The Erie section. Starting at its junction with the Niagara section at a point in the vicinity of the crossing of Dingens street and the Lehigh Valley railroad in the town of Cheektowaga, thence southerly generally paralleling the Lehigh Valley railroad to Cazenovia creek and extending southerly and southwesterly to a point north of the village of Hamburg, thence in a southwesterly direction generally paralleling the existing Southwestern Boulevard to a point near the village of Irving, thence bypassing the village of Silver Creek to the south, thence extending in a general southwesterly direction to the Pennsylvania state line on a location lying in the vicinity of United States route number twenty and state touring route number five.

7. The New England section. Beginning at or near the point of intersection of the Bronx and Pelham parkway and the extension of Bruckner boulevard in New York city, extending in a generally northerly direction to a point on or near east two hundred twenty-second street, thence generally in an eastern direction to the New York city-Westchester county line north of Pelham Bay park, thence generally in a northeasterly direction through the town of Pelham, the city of

New Rochelle, the town of Mamaroneck, the village of Mamaroneck, the town of Harrison, the city of Rye, the town of Rye and the village of Port Chester, to a point on the New York-Connecticut state line.

8. The Niagara section. Starting at the junction of the Erie and the Ontario sections at a point in the vicinity of the crossing of Dingens street and the Lehigh Valley railroad in the town of Cheektowaga, thence generally in a westerly direction to Erie street in the city of Buffalo, thence continuing in a general northwesterly direction to the Front, thence through the Front and north between Niagara street and the ship canal to the right of way of the abandoned Erie canal near the northern end of such ship canal, thence generally along such right of way, deviating therefrom to make a connection with the easterly approach of the South Grand Island bridge, thence across the Niagara river, utilizing the existing South Grand Island bridge or constructing another bridge parallel to such bridge, or both, thence along or parallel to existing Grand Island boulevard, across the Niagara river, utilizing the existing North Grand Island bridge, or constructing another bridge parallel to such bridge, or both.

9. The Berkshire section. Starting at a point or points on the Catskill section northeast of Becker's Corners, thence easterly to a point on the West bank of the Hudson river, which point shall be more than fifteen miles north of the Rip Van Winkle bridge, thence across a bridge to be constructed by the authority and which crossing shall be known as "The Castleton-on-Hudson Bridge"; and thence generally in a southeasterly direction and passing in the vicinity of the hamlets of Brookview, North Chatham, Old Chatham, and East Chatham to a point on the New York-Massachusetts boundary line near the hamlet of State Line.

The thruway constructed along the routes designated in this section shall be known as "The Governor Thomas E. Dewey Thruway".

§ 357. Right of authority to use state property; payment for improvements

On assuming jurisdiction of a thruway highway section or connection or any part thereof, or of a highway connection, or of the New York state canal system, the authority shall have the right to possess and use for its corporate purposes so long as its corporate existence shall continue, any real property and rights in real property theretofore acquired by the state, including all improvements thereon and state canal lands and properties; provided that the use by the authority of canal lands and properties for highway purposes shall not interfere with the use thereof for canal purposes.

§ 357-a. State Police—payment for services

Enforcement assistance provided by the division of state police at the request of the authority shall be reimbursed by the authority from the miscellaneous special revenue fund, New York state thruway authority account. The comptroller is hereby authorized and directed to deposit to this account revenues received from the thruway authority as reimbursement for expenditures. In addition, the authority shall reimburse the division for administrative and other support services connected with such assistance. Such reimbursement shall be made from the miscellaneous special revenue fund, New York state thruway income account. The authority shall deposit said reimbursement funds for administrative and other support services to the credit of the division of state police on a quarterly basis, on or before June thirtieth, September thirtieth, December thirtieth and March first of each year.

§ 358. Acquisition of real property by the commissioner

1. On assuming jurisdiction of a thruway section or connection or any part thereof, or of a highway connection, the authority may from time to time determine what real property is necessary for the construction, improvement and operation thereof, in addition to real property theretofore acquired by

the state. If funds are made available by the authority for payment of the cost and expense of the acquisition thereof, the commissioner when requested by the authority shall acquire such real property in the name of the state by appropriation, and, where necessary, remove the owner or occupant thereof and obtain possession according to the procedure provided by section three hundred forty-seven of the highway law. The authority shall have the right to possess and use for its corporate purposes so long as its corporate existence shall continue all such real property and rights in real property so acquired.

2. Claims for the value of the property appropriated and for legal damages caused by any such appropriation shall be adjusted and determined by the commissioner with the approval of the authority, or by the court of claims as provided in said section three hundred forty-seven. When a claim has been filed with the court of claims, the claimant shall cause a copy of such claim to be served upon the authority and the authority shall have the right to be represented and heard before said court. All awards and judgments arising from such claims shall be paid out of moneys of the authority.

§ 358-a. Acquisition of real property by the authority

On assuming jurisdiction of a thruway section or connection or any part thereof, or of a highway connection, the authority may from time to time determine what real property is necessary for the construction, improvement and operation of such thruway section or connection or part thereof, or of a highway connection, in addition to real property acquired or to be acquired by the state, and thereupon may acquire such real property by condemnation pursuant to the condemnation law. The authority may also, and in any case, acquire real property in the name of the state by deed and may pay such price therefor as shall be agreed with the owner thereof.

§ 359. Construction, reconstruction and improvement

1. On assuming jurisdiction of a thruway section or connection or any part thereof, or of a highway connection, or of the New York state canal system, the authority shall proceed with the construction, reconstruction or improvement thereof. All such work shall be done pursuant to a contract or contracts which shall be let to the lowest responsible bidder, by sealed proposals publicly opened, after public advertisement and upon such terms and conditions as the authority shall require; provided, however, that the authority may reject any and all proposals and may advertise for new proposals, as herein provided, if in its opinion, the best interests of the authority will thereby be promoted; provided further, however, that at the request of the authority, all or any portion of such work, together with any engineering required by the authority in connection therewith, shall be performed by the commissioner and his subordinates in the department of transportation as agents for, and at the expense of, the authority.

2. All construction, reconstruction and improvements and any engineering work required in connection therewith which are performed on behalf of the authority by the commissioner shall be carried on, generally, in the same manner and subject to the same provisions of law as apply to the construction and improvement of state highways.

3. Highway and railroad grade crossings shall in general be separated by structures to be determined by the authority, and the authority is hereby authorized to combine or relocate intersecting highways, to adjust traffic to such grade separation structures, except that the grade crossing elimination structures involved in public service commission cases number fifty-four hundred seventy-two and nine thousand fifty-eight shall remain under the jurisdiction of such commission. The cost of all such structures, except such part as is otherwise payable, shall be borne by the authority. Telephone and telegraph wires, power transmission and gas, oil and water lines, conduits, cables of every kind and nature, which may be

affected by thruway construction, reconstruction or improvement, may, in the discretion of the authority, be relocated in suitable facilities and the expense of such relocation and of installing such facilities shall be borne by the authority. The work of such relocation may be done by the owner of such wires, lines, conduits and cables, and the authority is hereby empowered to enter into an agreement with such owner for the performance of all or any part of the work of such relocations at the expense of the authority.

4. In the case of a separation of a grade crossing pursuant to the preceding subdivision, the structure shall be maintained and repaired by the authority. Whenever the authority determines that a separation structure carrying a highway under the jurisdiction of a municipality requires major repair or reconstruction, the authority, with the approval of the commissioner of transportation and after consultation with such municipality, may close the bridge and provide adequate alternative detour routing and signing. In the case of municipal highways, the responsibility for rehabilitation and reconstruction of the wearing surface, sidewalks, curbs and railings shall be the responsibility of the authority. Highways combined, relocated or carried over or under a thruway section or connection, or a highway connection, under the provisions of the preceding subdivision, shall, upon completion of the work, revert to and become the responsibility, with regard to maintenance and repair, of the state or municipality, as the case may be, formerly having jurisdiction there over.

§ 360. Operation and maintenance

Operation and maintenance by the authority of any thruway section or connection or any part thereof or of a highway connection, the New York state canal system of which it has assumed jurisdiction shall be performed (a) by the use of authority forces and equipment at the expense of the authority or by agreement at the expense of the state or other parties; (b) by contract with municipalities or independent contractors; (c) at the request of the authority, by the com-

missioner and his subordinates in the department of transportation as agents for, and at the expense of the authority, or (d) by a combination of such methods.

§ 361-b. Jurisdiction in certain suits against the authority

Exclusive jurisdiction is hereby conferred upon the court of claims to hear and determine the claims of any person against the authority (a) for its tortious acts and those of its agents, and (b) for breach of a contract relating to construction, reconstruction, improvement, maintenance or operation, in the same manner and to the extent provided by and subject to the provisions of the court of claims act with respect to claims against the state, and to make awards and render judgments therefor. All awards and judgments arising from such claims shall be paid out of moneys of the authority.

§ 362. Assistance by state officers, departments, boards, divisions and commissions

At the request of the authority, engineering and legal services for such authority shall be performed by forces or officers of the department of transportation and the department of law respectively, and all other state officers, departments, boards, divisions and commissions shall render services within their respective functions. At the request of the authority, services in connection with the collection of any charges or fees for the use of the thruway, the New York state canal system or any part thereof may be performed by the department of motor vehicles.

§ 363. Annual report

The authority shall submit to the governor, to the legislature, to the comptroller and to the director of the budget on or before the first day of February of each year a detailed report setting forth its operations and fiscal transactions during the preceding calendar year with a statement of its financial condition as of the end of such year and a statement of all

receipts and expenditures during such year. Such report shall include detailed information relating to additional expenditures incurred by the authority as a result of the amendments made to subdivision four of section three hundred fifty-nine of this chapter pursuant to the chapter of the laws of nineteen hundred ninety-two which enacted this sentence.

§ 364. Deposit and investment of moneys of the authority

All moneys of the authority from whatever source derived shall be paid to the comptroller as agent of the authority, who shall not commingle such moneys with any other moneys. Such moneys shall be deposited in a separate bank account or accounts. The moneys in such accounts shall be paid out on check of the comptroller on requisition of the chairman of the authority or of such other person as the authority may authorize to make such requisition. All deposits of such moneys shall, if required by the comptroller or the authority, be secured by obligations of the United States or of the state of New York of a market value equal at all times to the amount of the deposit and all banks and trust companies are authorized to give such security for such deposits. The comptroller and his legally authorized representatives are hereby authorized and empowered from time to time to examine the accounts and books of the authority, including its receipts, disbursements, contracts, leases, sinking funds, investments and any other matters relating to its financial standing.

Notwithstanding the provisions of this section, the authority shall have power, subject to the approval of the comptroller, to contract with the holders of any of its notes or bonds as to the custody, collection, securing, investment and payment of any moneys of the authority, or any moneys held in trust or otherwise for the payment of notes or bonds or in any way to secure notes or bonds, and to carry out any such contract. Moneys held in trust or otherwise for the payment of notes or bonds or in any way to secure notes or bonds and deposits of such moneys may be secured in the same manner

as moneys of the authority, and all banks and trust companies are authorized to give such security for such deposits.

Moneys of the authority not required for immediate use may, in the discretion of the authority, be invested by the comptroller in obligations in which the comptroller may invest pursuant to section ninety-eight-a of the state finance law.

Subject to agreements with noteholders and bondholders and the approval of the comptroller, the authority shall prescribe a system of accounts.

§ 365. Notes or bonds of the authority

1. (a) Subject to the provisions of section three hundred sixty-six of this title, the authority shall have the power and is hereby authorized from time to time to issue its negotiable notes and bonds in conformity with applicable provisions of the uniform commercial code in such principal amount as, in the opinion of the authority, shall be necessary to provide sufficient moneys for achieving the corporate purposes thereof, including construction, reconstruction and improvement of the thruway sections and connections, and highway connections herein described, the New York state canal system subject to the provisions of section three hundred eighty-three of this title, together with suitable facilities and appurtenances, the payment of all indebtedness to the state, the cost of acquisition of all real property, the expense of maintenance and operation, interest on notes and bonds during construction and for a reasonable period thereafter, establishment of reserves to secure notes or bonds, and all other expenditures of the authority incident to and necessary or convenient to carry out its corporate purposes and powers.

(b) The authority shall have power from time to time to issue renewal notes, to issue bonds to pay notes, and whenever it deems refunding expedient, to refund any bonds by the issuance of new bonds, whether the bonds to be refunded have or have not matured, and may issue bonds partly to refund

bonds then outstanding and partly for any other purpose. The refunding bonds shall be sold and the proceeds applied to the purchase, redemption or payment of the bonds to be refunded.

(c) Except as may otherwise be expressly provided by the authority, every issue of the notes or bonds shall be general obligations payable out of any moneys or revenues of the authority, subject only to any agreements with the holders of notes or bonds pledging any receipts or revenues.

[(d) Repealed.]

2. The notes and bonds shall be authorized by resolution of the board, shall bear such date or dates and mature at such time or times, in the case of notes and any renewals thereof within five years after their respective dates and in the case of bonds not exceeding forty years from their respective dates, as such resolution or resolutions may provide. The notes and bonds shall bear interest at such rate or rates, be in such denominations, be in such form, either coupon or registered, carry such registration privileges, be executed in such manner, be payable in such medium of payment, at such place or places, and be subject to such terms of redemption as such resolution or resolutions may provide. Bonds and notes shall be sold by the authority, at public or private sale, at such price or prices as the authority may determine. Bonds and notes of the authority shall not be sold by the authority at private sales unless such sale and the terms thereof have been approved in writing by the comptroller, where such sale is not to the comptroller, or by the director of the budget, where such sale is to the comptroller. Bonds and notes sold at public sale shall be sold by the comptroller, as agent of the authority, in such manner as the authority, with the approval of the comptroller, shall determine.

3. Any resolution or resolutions authorizing any notes or bonds or any issue thereof may contain provisions, which shall be a part of the contract with the holders thereof, as to

(a) pledging all or any part of the fees, charges, gifts, grants, rents, revenues or other moneys received or to be received and leases or agreements to secure the payment of the notes or bonds or of any issue thereof subject to such agreements with bondholders as may then exist;

(b) the rates of the fees or charges to be established, and the amounts to be raised in each year thereby and the use and disposition of the fees, charges, gifts, grants, rents, revenues or other moneys received or to be received;

(c) the setting aside of reserves or sinking funds, and the regulation and disposition thereof;

(d) limitations on the purpose to which the proceeds of sale of any issue of notes or bonds then or thereafter to be issued may be applied and pledging such proceeds to secure the payment of the notes or bonds or of any issue thereof;

(e) limitations on the issuance of additional notes or bonds; the terms upon which additional notes or bonds may be issued and secured; the refunding of outstanding or other notes or bonds;

(f) the procedure, if any, by which the terms of any contract with noteholders or bondholders may be amended or abrogated, the amount of notes or bonds the holders of which must consent thereto, and the manner in which such consent may be given;

(g) limitations on the amount of moneys to be expended by the authority for operating, administrative or other expenses of the authority;

(h) in the case of notes or bonds not guaranteed by the state, vesting in a trustee or trustees such property, rights, powers and duties in trust as the authority may determine which may include any or all of the rights, powers and duties of the trustee appointed by the bondholders pursuant to this title, and limiting or abrogating the right of the bondholders to appoint a trustee under this title or limiting the rights, duties and powers of such trustee;

(i) the acquisition of jurisdiction over, and of property for, thruways, the New York state canal system, and the construction, reconstruction, improvement, maintenance or operation thereof;

(j) any other matters, of like or different character, which in any way affect the security or protection of the notes or bonds.

4. Whenever the authority pledges its revenues under a resolution authorized by this section, such resolution shall not prohibit the authority from financing for additional corporate transportation purposes authorized by law secured by an additional pledge of such revenues. Such additional pledge of revenues may, in the discretion of the authority, be subordinate to the pledge of such revenues securing other bonds, notes or other evidence of indebtedness of the authority. Provided, however, the authority shall not make any such additional pledge if the security of the bonds, notes or other evidences of indebtedness previously issued will be impaired as a result thereof.

5. It is the intention hereof that any pledge made by the authority shall be valid and binding from the time when the pledge is made; that the moneys so pledged and thereafter received by the authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act, and that the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the authority irrespective of whether such parties have notice thereof. Neither the resolution nor any other instrument by which a pledge is created need be recorded.

6. Neither the members of the board nor any person executing the notes or bonds shall be liable personally on the notes or bonds or be subject to any personal liability or accountability by reason of the issuance thereof.

7. The authority shall have power out of any funds available therefor to purchase notes or bonds, which shall thereupon be cancelled, at a price not exceeding (a) if the notes or bonds are then redeemable, the redemption price then applicable plus accrued interest to the next interest payment date thereon, or (b) if the notes or bonds are not then redeemable, the redemption price applicable on the first date after such purchase upon which the notes or bonds become subject to redemption plus accrued interest to said date.

§ 366. Guaranty by the state

1. To the extent authorized by the constitution at the time of the issuance of notes or bonds, the punctual payment of the notes and bonds shall be, and the same hereby is, fully and unconditionally guaranteed by the state, both as to principal and interest, according to their terms; and such guaranty shall be expressed upon the face thereof by the signature or facsimile signature of the comptroller or a deputy comptroller. In the event that the authority shall fail to pay when due, the principal of, or interest on, the notes or bonds, the comptroller shall pay the holder thereof, and thereupon the state shall be subrogated to the rights of the noteholders or bondholders so paid.

2. The authority shall have power to issue notes and bonds without the guaranty of the state and may issue such notes or bonds before and after the issuance of notes or bonds so guaranteed.

3. When guaranteed notes or guaranteed bonds are outstanding, notes or bonds secured by a pledge of receipts or revenues having priority over such outstanding guaranteed notes or guaranteed bonds shall not be issued, except with the consent of the comptroller, and unless the authority shall by resolution first find and determine that, notwithstanding such pledge, the authority will have adequate means to meet its obligations to the holders of such outstanding guaranteed notes or bonds.

4. When notes or bonds are outstanding secured by a pledge of receipts or revenues, guaranteed notes or bonds either unsecured, or secured by a pledge of receipts or revenues subordinate to the pledge securing such outstanding notes or bonds, shall not be issued unless the authority shall first find and determine by resolution that notwithstanding the pledge securing such outstanding notes or bonds, the authority will have adequate means to meet its obligations on the guaranteed notes or bonds about to be issued.

§ 367. State's right to require redemption of bonds

Notwithstanding and in addition to any provisions for the redemption of bonds which may be contained in any contract with the holders of the bonds, the state may, upon furnishing sufficient funds therefor, require the authority to redeem, prior to maturity, as a whole, any issue of bonds on any interest payment date not less than fifteen years after the date of the bonds of such issue at one hundred four per centum of their face value and accrued interest or at such lower redemption price as may be provided in the bonds in case of the redemption thereof as a whole on the redemption date. Notice of such redemption shall be published in at least two newspapers published and circulating respectively in the cities of Albany and New York at least twice, the first publication to be at least thirty days before the date of redemption.

§ 368. Remedies of noteholders and bondholders

1. In the event that the authority shall default in the payment of principal of or interest on any issue of notes or bonds after the same shall become due, whether at maturity or upon call for redemption, and such default shall continue for a period of thirty days, or in the event that the authority shall fail or refuse to comply with the provisions of this title, or shall default in any agreement made with the holders of any issue of notes or bonds, the holders of twenty-five per centum in aggregate principal amount of the notes or bonds of such issue then outstanding, by instrument or instruments filed in

the office of the clerk of the county of Albany and proved or acknowledged in the same manner as a deed to be recorded, may appoint a trustee to represent the holders of such notes or bonds for the purposes herein provided.

2. Such trustee may, and upon written request of the holders of twenty-five per centum in principal amount of such notes or bonds then outstanding shall, in his or its own name

(a) by mandamus or other suit, action or proceeding at law or in equity enforce all rights of the noteholders or bondholders, including the right to require the authority to collect fees, rentals and charges adequate to carry out any agreements with the holders of such notes or bonds and to perform its duties under this title;

(b) bring suit upon such notes or bonds;

(c) by action or suit in equity, require the authority to account as if it were the trustee of an express trust for the holders of such notes or bonds;

(d) by action or suit in equity, enjoin any acts or things which may be unlawful or in violation of the rights of the holders of such notes or bonds;

(e) declare all such notes or bonds due and payable, and if all defaults shall be made good then with the consent of the holders of twenty-five per centum of the principal amount of such notes or bonds then outstanding, to annul such declaration and its consequences; provided, however, that this clause (e) shall not be applicable in the case of notes or bonds guaranteed by the state.

3. Such trustee, whether or not the issue of bonds or notes represented by such trustee has been declared due and payable, shall be entitled as of right to the appointment of a receiver of any part or parts of the thruway, the fees, rentals, charges or other revenues of which are pledged for the security of the bonds or notes of such issue and such receiver may enter and take possession of such part or parts of the thruway

and, subject to any pledge or agreement with bondholders, shall take possession of all moneys and other property derived from or applicable to the construction, operation, maintenance and reconstruction of such part or parts of the thruway and proceed with any construction thereon which the authority is under obligation to do and shall operate, maintain and reconstruct such part or parts of the thruway, and collect and receive all fees, rentals, charges and other revenues thereafter arising therefrom subject to any pledge thereof or agreement with bondholders or noteholders relating thereto and perform the public duties and carry out the agreements and obligations of the authority under the direction of the court. In any suit, action or proceeding by the trustee the fees, counsel fees and expenses of the trustee and of the receiver, if any, shall constitute taxable disbursements and all costs and disbursements allowed by the court shall be a first charge on any tolls, rentals and other revenues derived from such part or parts of the thruway.

4. Such trustee shall in addition to the foregoing have and possess all of the powers necessary or appropriate for the exercise of any functions specifically set forth herein or incident to the general representation of bondholders or noteholders in the enforcement and protection of their rights.

5. The supreme court shall have jurisdiction of any suit, action or proceeding by the trustee on behalf of such noteholders or bondholders. The venue of any such suit, action or proceeding shall be laid in the county of Albany.

6. Before declaring the principal of notes or bonds not guaranteed by the state due and payable, the trustee shall first give thirty days' notice in writing to the authority.

§ 369. Liability of state

The state shall be liable on notes or bonds guaranteed hereunder but shall not be liable on notes or bonds not guaranteed by the state which shall not be a debt of the state.

§ 370. Notes and bonds legal investments for public officers and fiduciaries

The notes and bonds are hereby made securities in which all public officers and bodies of this state and all municipalities and municipal subdivisions, all insurance companies and associations and other persons carrying on an insurance business, all banks, bankers, trust companies, savings banks and saving associations, including savings and loan associations, building and loan associations, investment companies and other persons carrying on a banking business, all administrators, guardians, executors, trustees and other fiduciaries and all other persons whatsoever who are now or may hereafter be authorized to invest in bonds or other obligations of the state, may properly and legally invest funds including capital in their control or belonging to them. The notes and bonds are also hereby made securities which may be deposited with and may be received by all public officers and bodies of this state and all municipalities and municipal subdivisions for any purpose for which the deposit of bonds or other obligations of this state is now or may hereafter be authorized.

§ 371. Tax exemption

The property of the authority and its income and operations shall be exempt from taxation.

§ 372. Tax covenant

The state covenants with the purchasers and with all subsequent holders and transferees of notes and bonds issued by the authority, in consideration of the acceptance of and payment for the notes and bonds, that the notes and bonds of the authority issued pursuant to this title and the income therefrom and all its fees, charges, rents, gifts, grants, revenues, receipts and other moneys received or to be received, pledged to pay or secure the payment of such notes or bonds shall at all times be free from taxation except for estate or gift taxes and taxes on transfers.

§ 373. Agreement of the state

1. The state does pledge to and agree with the holders of notes, bonds, or other obligations of the authority not guaranteed by the state that the state will not limit or alter the rights hereby vested in the authority to establish and collect such fees, rentals and charges as may be convenient or necessary to produce sufficient revenue to meet the expense of maintenance and operation and to fulfill the terms of any agreements made with the holders thereof, or in any way impair the rights and remedies of such holders until such notes, bonds, and other obligations, together with the interest thereon, with interest on any unpaid installments of interest, and all costs and expenses in connection with any action or proceedings by or on behalf of such holders, are fully met and discharged.

2. The state does pledge to and agree with the holders of any notes or bonds of the authority, not guaranteed by the state, secured by a pledge of the tolls or other revenues or any part thereof from any bridge constructed by the authority across the Hudson river south of Bear mountain bridge or from any part of the thruway which includes such bridge, that no bridge or tunnel constituting a connection for vehicular traffic over, under or across the Hudson river between the present location of the Bear mountain bridge and the boundary line between the state of New York and the state of New Jersey at the west side of the Hudson river will be constructed or maintained so long as the obligations of such bonds for principal and interest shall not have been paid or otherwise discharged.

§ 376. Further additional powers of the authority

The authority shall have the power, in addition to the powers granted in other sections of this title:

1. (a) To enter into a cooperative highway contractual agreement or agreements with the commissioner of transportation for the financing by the authority of expenditures

made in advance by the state for design, acquisition, construction, reconstruction or the reconditioning and preservation of transportation facilities pursuant to the provisions of section eighty-eight-b of the state finance law, state highways, state parkways, state arterial highways in cities and related facilities and structures thereon, including bridges, the reconditioning and preservation of structures separating highways and railroads, and the traffic operations program to increase capacity and safety on existing street and highway systems in urban areas, capacity and infrastructure improvements to state, county, town, city or village roads, highways, parkways and bridges, in any case where the expense thereof is paid in whole or in part by the state.

(b) To issue use permits to the commissioner of transportation for projects financed by the authority of expenditures made in advance by the state in accordance with the provisions of a cooperative highway contractual agreement or agreements provided, that such projects are maintained and operated under the supervision of the department of transportation or the municipal agency designated by the commissioner of transportation without cost to the New York State thruway authority for the full term of such agreement or agreements, and, provided further that such use permit shall be granted by the authority for the use of such projects by the department of transportation or the municipal agency designated by the commissioner of transportation on a toll free basis.

2. From time to time to issue emergency highway reconditioning and preservation bonds and notes for the purposes of this section. All the provisions of this title relating to bonds and notes, which are not inconsistent with the provisions of this section, shall apply to the bonds and notes authorized by this section. The authority shall not issue emergency highway reconditioning and preservation bonds and notes in an aggregate principal amount exceeding: (a) one hundred million dollars, excluding bonds issued to refund outstanding

notes, in the period from April first, nineteen hundred seventy-two through March thirty-first, nineteen hundred eighty-two; and (b) an additional one hundred thirty-six million dollars, excluding bonds issued to refund outstanding notes, on or after April first, nineteen hundred eighty-two but before April first, nineteen hundred eighty-six.

2-a. From time to time issue emergency highway construction and reconstruction bonds and notes for the purposes of this section. All the provisions of this title relating to bonds and notes which are not inconsistent with the provisions of this section shall apply to the bonds and notes authorized by this section. The authority shall not issue emergency highway construction and reconstruction bonds and notes in an aggregate principal amount exceeding: (a) one hundred million dollars, excluding bonds or notes issued to refund outstanding bonds or notes, before April first, nineteen hundred ninety and (b) an additional thirty-four million dollars, excluding bonds or notes issued to refund outstanding bonds or notes, on or after April first, nineteen hundred ninety and (c) an additional ninety-three million dollars, excluding bonds or notes, issued to refund outstanding bonds or notes on or after April first, nineteen hundred ninety-one and (d) an additional ninety million dollars, excluding bonds or notes issued to refund outstanding bonds or notes, on or after April first, nineteen hundred ninety-two.

2-b. From time to time to enter into agreements with the commissioner of transportation to finance the capital costs of projects authorized pursuant to section eighty-eight-b of the state finance law, and to issue bonds and notes for capital projects approved by metropolitan planning organizations or transportation coordinating committees pursuant to the provisions of such section eighty-eight-b. All the provisions of this title relating to bonds and notes which are not inconsistent with the provisions of this section shall apply to the bonds and notes authorized by this section.

2-c. From time to time to issue additional emergency highway reconditioning and preservation bonds and notes for the purposes of this section. All the provisions of this title relating to bonds and notes, which are not inconsistent with the provisions of this section, shall apply to the bonds and notes authorized by this section. The authority shall not issue such additional emergency highway reconditioning and preservation bonds and notes in an aggregate principal amount exceeding (a) forty-eight million dollars, excluding bonds or notes issued to refund outstanding bonds or notes, on or after April first, nineteen hundred ninety, and (b) an additional eighty-four million dollars excluding bonds or notes issued to refund outstanding bonds or notes on or after April first, nineteen hundred ninety-one, and (c) an additional eighty-five million dollars, excluding bonds or notes issued to refund outstanding bonds or notes, on or after April first, nineteen hundred ninety-two.

3. In addition to the provisions authorized by this title any resolution or resolutions authorizing any bonds or notes for the purposes of this section may contain provisions which may be a part of the contract with the holders of such bonds providing for the creation and establishment and maintenance of reserve funds and payments to such reserve funds as hereinafter in this subdivision set forth.

The authority may create and establish reserve funds to be known as the emergency highway reconditioning and preservation debt service reserve fund, the emergency highway construction and reconstruction debt service reserve fund and the suburban transportation debt service reserve fund and may pay into such reserve funds (a) moneys made available by the state for the purposes of such funds from the emergency highway reconditioning and preservation fund, or the emergency highway construction and reconstruction fund or the suburban transportation fund as created by section eighty-nine, eighty-nine-a or eighty-eight-b of the state finance law, respectively; (b) any proceeds of sale of bonds and notes to the extent pro-

vided in the resolution of the authority authorizing the issuance thereof; and (c) any other moneys which may be made available to the authority for the purposes of such funds from any other source or sources. The moneys held in or credited to such debt service reserve funds established under this subdivision, except as hereinafter provided, shall be used solely for the payment of the principal of bonds of the authority secured by such reserve funds, as the same mature, the purchase of such bonds of the authority, the payment of interest on such bonds of the authority or the payment of any redemption premium required to be paid when such bonds are redeemed prior to maturity; provided, however, that moneys in any such funds shall not be withdrawn therefrom at any time in such amount as would reduce the amount of such funds to less than the maximum amount of principal and interest maturing and becoming due in any succeeding calendar year on the bonds of the authority then outstanding and secured by such reserve funds, except for the purpose of paying principal and interest on the bonds of the authority secured by such reserve funds maturing and becoming due and for the payment of which other moneys of the authority are not available. Any income or interest earned by, or increment to, any such debt service reserve funds due to the investment thereof may be transferred to any other fund or account of the authority established for the purposes of this section to the extent it does not reduce the amount of such debt service reserve funds below the maximum amount of principal and interest maturing and becoming due in any succeeding calendar year on all bonds of the authority then outstanding and secured by such reserve funds.

4. The authority shall not issue bonds at any time for the purposes of this section if the maximum amount of principal and interest maturing and becoming due in a succeeding calendar year on the bonds outstanding and then to be issued and secured by any debt service reserve fund will exceed the amount of such reserve fund at the time of issuance, unless the authority at the time of issuance of such bonds, shall

deposit in such reserve fund from the proceeds of the bonds so to be issued, or otherwise, an amount which together with the amount then in such reserve fund, will be not less than the maximum amount of principal and interest maturing and becoming due in any succeeding calendar year on the bonds then to be issued and on all other bonds of the authority then outstanding and secured by such reserve fund.

5. (a) To assure the continued operation and solvency of the authority for the carrying out of the purposes relating to this section provision is made in this section for the accumulation in the debt service reserve fund of an amount equal to the maximum amount of principal and interest maturing and becoming due in any succeeding calendar year on all bonds of the authority then outstanding and secured by such reserve fund. In order further to assure the maintenance of such debt service reserve fund, with respect to bonds of the authority issued pursuant to this section prior to April first, nineteen hundred ninety, there shall be annually apportioned and paid to the authority for deposit in such debt service reserve fund such sum, if any, as shall be certified by the chairman of the authority to the governor and state director of the budget as necessary to restore such reserve fund to an amount equal to the maximum amount of principal and interest maturing and becoming due in any succeeding calendar year on the bonds of the authority then outstanding and secured by such reserve fund. The chairman of the authority shall annually, on or before December first, make and deliver to the governor and state director of the budget his certificate stating the sum, if any, required to restore such debt service reserve fund to the amount aforesaid, and the sum or sums so certified, if any, shall be apportioned and paid to the authority during the then current state fiscal year.

(b) To assure the continued operation and solvency of the authority for the carrying out of the purposes relating to this section, provision is made in this section for the accumulation in the debt service reserve fund of an amount equal to the maximum amount of principal and interest maturing and

becoming due in any succeeding calendar year on all bonds of the authority then outstanding and secured by such reserve fund; provided however for such bonds issued by the authority after April first, nineteen hundred ninety-two, such debt service reserve fund may in the discretion of the authority and consistent with any covenants with any existing bondholders and without impairing the rights of any existing bondholders be sized in an amount equal to not less than one-half of the maximum amount of principal and interest maturing and becoming due in any succeeding calendar year on such bonds of the authority then outstanding and secured by such debt service reserve fund. In order to further assure the maintenance of such debt service reserve fund, with respect to bonds of the authority issued pursuant to subdivisions two-a, two-b and two-c of this section after April first, nineteen hundred ninety, the authority shall create a special subaccount in each revenue fund established pursuant to any resolution or resolutions authorizing such bonds. Such subaccounts shall consist of the moneys available after April first, nineteen hundred ninety, pursuant to sections two hundred eighty-two-b, two hundred eighty-two-c, two hundred eighty-four-a and two hundred eighty-four-c of the tax law, respectively, in the emergency highway reconditioning and preservation fund reserve account established pursuant to paragraph (b) of subdivision two of section eighty-nine of the state finance law and in the emergency highway construction and reconstruction fund reserve account established pursuant to paragraph (b) of subdivision two of section eighty-nine-a of the state finance law, apportioned and paid to the authority for deposit in such subaccount of the revenue fund. Amounts in each such subaccount shall be kept separate and shall not be commingled with any other moneys in the custody of the authority. Amounts in each such subaccount shall be applied solely to pay such sum, if any, as shall semi-annually, (on such dates as are established under the terms of any cooperative highway contractual agreement of the department of transportation with the New York state thruway authority entered into on or

after April first, nineteen hundred ninety which is then in effect), be certified by the chairman of the authority to the governor and state director of the budget as necessary to provide funds in an amount sufficient together with other moneys available to the authority for such purpose, to pay one-half of the total annual principal and interest maturing and becoming due during the next succeeding twelve calendar months on all bonds of the authority issued pursuant to subdivisions two-a, two-b and two-c of this section after April first, nineteen hundred ninety and maintaining or funding debt service reserve funds therefor. Any surplus of funds in excess of such certified amounts remaining in each such subaccount after such payments, if any, have been made shall on the dates established under the terms of such cooperative highway agreements, be paid over for deposit, respectively, in the emergency highway reconditioning and preservation fund reserve account established pursuant to paragraph (b) of subdivision two of section eighty-nine of the state finance law and in the emergency highway construction and reconstruction fund reserve account established pursuant to paragraph (b) of subdivision two of section eighty-nine-a of the state finance law.

6. In computing the debt service reserve fund for the purposes of this section, securities in which all or a portion of such reserve fund shall be invested shall be valued at par, or if purchased at less than par, at their cost to the authority.

7. The authorization, sale and issuance of bonds, notes or other obligations pursuant to this section shall not be deemed an action as such term is defined in article eight of the environmental conservation law for the purposes of such article. Such exemption shall be strictly limited in its application to such financing activities of the authority and does not exempt the department of transportation or any other entity from compliance with such article.

§ 379. Further additional powers of the authority to finance certain repayment obligations of the state in connection with the purchase of real property for highway purposes

1. (a) The authority is hereby authorized, as a corporate purpose thereof, to issue bonds and notes in an aggregate principal amount not to exceed fifty million dollars and to make available the proceeds from the sale of such bonds and notes, net of all costs to the authority in connection therewith, to the commissioner, for the purposes of financing a portion of the repayment to the treasurer of the United States of funds in an amount as determined by the secretary of the United States department of transportation to be equal to the amount of federal funds previously expended as adjusted by credits received to acquire real property for the portion of Interstate-478 which was withdrawn from the federal interstate system in accordance with federal law. Provided, however, that the authority shall not issue any bonds or notes authorized by this section until the federal highway administration has ruled on an application by the state, or the state and the city of New York, seeking a waiver of the repayment obligation of the state and city for federal funds expended to acquire real property for a portion of Interstate 478.

(b) Such bonds and notes shall be issued with the approval of the director of the budget and shall be special limited obligations of the authority, secured by and payable solely out of certain lease payments made by the state and funds and accounts held under the resolution pursuant to which such bonds and notes are issued, without recourse against other assets, revenues or funds of or other payments due to the authority.

(c) Such bonds and notes shall contain on the face thereof a statement to the effect that they shall not be deemed to be an obligation of the state and the state shall not be liable thereon.

(d) Such bonds shall be scheduled to mature over a term not to exceed thirty years.

(e) The provisions of title ten of article nine of this chapter, shall not apply in any way to the bonds or notes authorized to be issued by this section.

(f) All the provisions of this title relating to bonds and notes, which are not inconsistent with the provisions of this section, shall apply to the bonds and the notes authorized by this section, including, but not limited to, the power to issue renewal notes or refunding bonds thereof.

2. (a) Notwithstanding any general, special or local law, the state, acting by and through the commissioner, shall have the power to convey to the authority or its successor agency, without public bidding, public sale, or public notice, for such term, and upon such terms and conditions as the parties thereto shall agree, a leasehold interest in the real property purchased in part with federal funds in the name of the state for the portion of then-designated Interstate-478 which was withdrawn from the interstate system in accordance with federal law. Any lease entered into pursuant to the provisions of this section shall be for a period not less than that for which debt service is due and payable on any bonds and notes issued by the authority pursuant to this section and not more than thirty days after the period for which debt service is due and payable on any bonds and notes issued by the authority pursuant to this section.

(b) Notwithstanding the provisions of any general, special or local law, the state, acting by and through the commissioner, is hereby authorized to lease from the authority or its successor agency its interest in the real property purchased in part with federal funds in the name of the state for the portion of the then-designated Interstate-478 which was withdrawn from the interstate system in accordance with federal law, such lease to be upon such terms and conditions as the parties thereto shall agree, provided that such lease shall: (i) be for

a period not less than that for which debt service is due and payable on any bonds and notes issued by the authority pursuant to this section and not more than thirty days after the period for which debt service is due and payable on any bonds and notes issued by the authority pursuant to this section, (ii) provide for lease rental payments equal to the amount needed to pay debt service on said notes or bonds as the same become due and equal to the amount needed to cover all direct and/or indirect costs incurred by the authority and not reimbursed from bond proceeds, (iii) provide that during any year in which no debt service is due and payable on any such bonds and notes such lease rental payments shall be in an amount equal to one dollar, (iv) provide that the authority shall have no obligations or duties with respect to such real property except as set forth in this section, (v) provide that during such leasehold any future proposed acquisition, disposition or new or different utilization, development or improvement of the real property subject to such leasehold interest shall be subject to the provision of paragraph b of subdivision five of section three hundred forty-b of the highway law, if applicable by the terms thereof, (vi) provide that the lease rental revenue stream thereunder may be assigned to a trustee for the payment of holders of bonds authorized by this chapter but prohibit the assignment of any other interests in the land subject to such lease to said trustee, and (vii) provide that the obligation of the state to make such lease rental payments shall not constitute a debt of the state within the meaning of any constitutional or statutory provision and shall be deemed executory only to the extent of moneys made available to the state, and that no liability on account thereof shall be incurred by the state beyond the moneys available for the purpose thereof, and that any obligation to make lease rental payments shall be subject to annual appropriation by the legislature.

(c) The attorney general shall approve or disapprove of the form and sufficiency and manner of execution of any lease executed by the commissioner pursuant to the provisions of this section.

§ 380. Further additional powers of the authority to finance certain local highway and bridge improvements and payments to the authority

1. (a) The authority is hereby authorized, as additional corporate purposes thereof: (i) to issue bonds and notes and to incur obligations secured by the moneys as provided in the service contracts authorized pursuant to section eleven of the chapter of the laws of nineteen hundred ninety-one which enacted this section; (ii) to make available the proceeds from the sale of such bonds and notes, net of all costs to the authority in connection therewith, for the purposes of financing all or a portion of the capital costs of local highway and bridge projects pursuant to sections ten-c, ten-f and ten-g of the highway law and sections sixteen and sixteen-a of the chapter of the laws of nineteen hundred ninety-one which enacted this section, and section eighty-b of the highway law and section fifteen of the chapter of the laws of nineteen hundred ninety-one which enacted this section, and (iii) to enter into agreements with the commissioner with respect to financing any such local highways and bridges owned, maintained or operated by a municipality.

(b) The authority shall not issue bonds, notes or other obligations pursuant to paragraph (a) of subdivision one of this section unless an appropriation or appropriations have been enacted providing for the determination of the amount and manner of distribution of the proceeds of such issuance.

(c) Such obligations shall be issued or incurred with the approval of the director of the budget and shall be special limited obligations of the authority secured by and payable solely out of amounts appropriated by the legislature as authorized pursuant to such section eleven of the chapter of laws of nineteen hundred ninety-one and any other funds appropriated by the legislature to the authority therefor without recourse against any other assets, revenues or funds of or other payments due to the authority.

(d) Such obligations shall contain on the face thereof a statement to the effect that they shall not be deemed to be an obligation of the state and that the state shall not be liable thereon.

(e) All of the provisions of this title relating to bonds and notes, which are not inconsistent with the provisions of this section, shall apply to obligations authorized by this section, including but not limited to the power to issue renewal notes or refunding bonds thereof.

2. Not less than one hundred twenty days before the beginning of each state fiscal year, the chairman of the authority shall certify to the comptroller and to the director of the budget a schedule of anticipated cash requirements for such fiscal year. The total amount so certified for such fiscal year shall be equal to the total amount of the debt service due or expected to be due during such fiscal year on obligations of the authority incurred pursuant to subdivision one of this section, including payments of interest and principal (including sinking fund payments), together with:

(a) the amount, if any, due to any provider of any insurance policy, letter of credit or other letter of enhancement or a related facility with respect to such obligations, representing payments made by it as provided in the applicable resolution or trust indenture as a result of any previous failure of the state to make any payment provided for in this section, including any related reasonable interest, fees or charges so provided;

(b) the amount, if any, required to restore any applicable reserve fund to the applicable reserve fund requirement to the extent any deficiency therein has resulted directly or indirectly from failure by the state to make any payment provided for in this section;

(c) the amount, if any, required to be rebated to the United States to provide for continued exclusion from federal income taxation of interest on obligations of the authority; and

(d) the expenses of the establishment and continued operating expenses of the authority relating to local highway and bridge projects funded pursuant to section eleven of the chapter of the laws of nineteen hundred ninety-one which added this section, including, but not limited to, trustees' fees, fees payable to providers of credit facilities, fees for issuing and paying agents, remarketing agents and dealers, legal counsel, financial or other advisors or consultants, independent auditors, providers of interest rate exchange agreements, rating agencies, transfer or information agents, the publication of advertisements and notices, surety arrangements, and printer's fees or charges incurred by the authority to comply with applicable federal and state securities and tax laws; and any other costs of issuance in excess of the amount provided therefor from the proceeds of the sale of such obligations, to the extent that any of the foregoing amounts or expenses are not to be paid from other resources available to the authority for such purpose.

3. The chairman of the authority may revise such certification at such times as shall be determined by the chairman; provided, however, that the chairman of the authority shall revise such certification not later than thirty days after the issuance of any obligations authorized pursuant to subdivision one of this section including refunding bonds, and the adoption of any interest rate exchange or other financial arrangement affecting the cash requirements of the authority with respect to the obligations incurred pursuant to this section.

4. Such certification shall provide for payments on such dates as the authority deems appropriate to ensure that sufficient funds will be available from the sources identified in this section to enable it to meet its current obligations with respect to those obligations incurred pursuant to this section as they become due.

5. Upon receipt of such certification, or any revision thereof, the comptroller shall pay such amount to the authority in accordance with such certification, from the service

contracts authorized pursuant to section eleven of the chapter of the laws of nineteen hundred ninety-one which added this section or from any other amount appropriated for such purpose. Such payments shall be made on or before the date specified in each certificate or within thirty days after such receipt, whichever is later, provided that all such amounts shall have been first appropriated by the state.

6. The state, acting through the director of the budget, and the authority may enter into, amend, modify, or rescind one or more agreements providing for the specific manner, timing, and amount of payments to be made under this section, but only in conformity with this section. The agreement of the state contained in this section shall be deemed executory only to the extent of appropriations available for payments under this section and no liability on account of any such payment shall be incurred by the state beyond such appropriations.

7. The authorization, sale and issuance of bonds, notes or other obligations pursuant to this section shall not be deemed an action as such term is defined in article eight of the environmental conservation law for the purposes of such article. Such exemption shall be strictly limited in its application to such financing activities of the authority and does not exempt the department of transportation or any other entity from compliance with such article.

§ 381. Further additional powers of the authority

1. The authority is hereby authorized, as additional corporate purposes thereof: (a) to issue bonds and notes and to incur obligations secured by the moneys as provided in the service contracts authorized pursuant to section fourteen of the chapter of the laws of nineteen hundred ninety-one which enacted this section; and (b) to make available the proceeds from the sale of such bonds and notes, net of all costs to the authority in connection therewith, to provide moneys to the authority to achieve the same corporate purposes as set forth in section three hundred sixty-five of this chapter. The author-

ity is further authorized to issue such obligations in an aggregate principal amount not to exceed eighty million dollars, exclusive of the principal amount of bonds, notes or other obligations issued and applied (1) to fund any related debt service fund, or other reserve funds as may be needed, (2) to provide capitalized interest, and (3) to provide fees and other charges and expenses, including underwriters' discount and the purchase of any credit or liquidity enhancement facilities, related to the issuance of bonds, notes or other obligations and the maintenance of such reserves, all as determined by the authority and excluding bonds, notes or other obligations issued to refund or otherwise repay bonds, notes or other obligations theretofore issued pursuant to this section. In computing the total principal amount of bonds, notes or other obligations that may at any time be issued for any purpose under this section, the amount of the outstanding bonds, notes or other obligations that constitutes interest under the United States Internal Revenue Code of 1986, as amended to the effective date of this section, shall be excluded. Provided, however, that upon any refunding or repayment, except in connection with the termination of the existence of the authority or if otherwise authorized by the legislature, the total aggregate principal amount of outstanding bonds, notes or other obligations may be greater than the amount authorized by this section only if the present value of the aggregate debt service of the refunding or repayment bonds, notes or other obligations to be issued shall not exceed the present value of the aggregate debt service of the bonds, notes or other obligations so to be refunded or repaid. For purposes of this section, the present values of the aggregate debt service of the refunding or repayment bonds, notes or other obligations and of the aggregate debt service of the bonds, notes or other obligations so refunded or repaid, shall be calculated by utilizing the effective interest rate of the refunding or repayment bonds, notes or other obligations, which shall be that rate arrived at by doubling the semi-annual interest rate (compounded semi-annually) necessary to discount the debt ser-

vice payments on the refunding or repayment bonds, notes or other obligations from the payment dates thereof to the date of issue of the refunding or repayment bonds, notes or other obligations and to the price bid including estimated accrued interest or proceeds received by the authority including estimated accrued interest from the sale thereof.

2. Such obligations shall be special limited obligations of the authority, secured by and payable solely out of payments received pursuant to service contract or contracts authorized by section fourteen of the chapter of the laws of nineteen hundred ninety-one which enacted this section, funded by amounts appropriated by the legislature and any other funds appropriated by the legislature to the authority therefor, without recourse against any other assets, revenues or funds of or other payments due to the authority.

3. Such obligations shall contain on the face thereof a statement to the effect that they shall not be deemed to be an obligation of the state and that the state shall not be liable thereon.

4. Such obligations shall be scheduled to mature over a term not to exceed thirty years.

5. All the provisions of this title relating to bonds and notes, which are not inconsistent with the provisions of this section, shall apply to obligations authorized by this section, including, but not limited to, the power to issue renewal notes or refunding bonds thereof.

§ 382. Canal corporation

1. There is hereby created a public benefit corporation known as the "New York state canal corporation" (hereinafter referred to as the "subsidiary corporation") as a subsidiary corporation of the authority. The subsidiary corporation is solely created to and shall have only the power to operate, maintain, construct, reconstruct, improve, develop, finance and promote the New York State canal system.

2. The authority may transfer to such subsidiary corporation any moneys, real, personal or mixed property or any personnel in order to carry out the purposes of this section. Such subsidiary corporation and any of its property, functions, and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the authority and of the authority's property, functions, and activities. Such subsidiary corporation shall be subject to the restrictions and limitations to which the authority may be subject. Such subsidiary corporation shall be subject to suit in accordance with section three hundred sixty-one-b of this title. The subsidiary corporation may delegate to one or more of its members, or its officers, agents and employees, such duties and powers as it may deem proper.

3. The members of such subsidiary corporation shall be the same persons holding the offices of members of the authority.

4. No officer or member of the corporation shall receive any additional compensation, either direct or indirect, other than reimbursement for actual and necessary expenses incurred in the performance of his or her duties, by reason of his or her serving as a member, director, or trustee of such subsidiary corporation.

5. The employees of the subsidiary corporation except those who are also employees of the authority, shall not be deemed to be employees of the authority by reason of their employment by the subsidiary corporation. However, officers, agents and employees of the subsidiary corporation and officers, agents and employees of the authority may transfer between the subsidiary corporation and the authority, or visa versa, as provided for in section three hundred fifty-five of this title. All officers, agents, and employees of the subsidiary corporation shall be subject to the provisions of the civil service law which shall apply to the subsidiary corporation as a municipal corporation other than a city. The subsidiary corporation shall participate on the New York state and local employees' retirement system.

6. The fiscal year of such subsidiary corporation shall be the same as the fiscal year for the authority.

7. The subsidiary corporation shall have the power to:

(a) operate, maintain, construct, reconstruct, improve, develop, finance and promote the New York state canal system as defined in the canal law;

(b) sue and be sued;

(c) have a seal and alter the same at pleasure;

(d) make and alter by-laws for its organization and internal management and make rules and regulations governing the use of its property and facilities;

(e) appoint officers, agents and employees, who shall be subject to section three hundred fifty-five of this chapter, and fix their compensation;

(f) make and execute contracts and all other instruments necessary or convenient for the exercise of its powers and functions under this chapter;

(g) acquire, hold and dispose of real or personal property for its corporate purposes;

(h) engage the services of private consultants on a contract basis for rendering professional and technical assistance and advice;

(i) procure insurance against any loss in connection with its activities, properties and other assets, in such amount and from such insurers as it deems desirable;

(j) invest any funds of the subsidiary corporation, or any other monies under its custody and control not required for immediate use or disbursement, at the discretion of the subsidiary corporation, in obligations of the state or the United States government or obligations the principal and interest of which are guaranteed by the state or the United States government, or in any other obligations in which the comptroller

of the state is authorized to invest pursuant to section ninety-eight-a of the state finance law;

(k) exercise those powers and duties of the authority pursuant to the canal law;

(l) prepare and submit a capital program plan pursuant to section ten of the canal law;

(m) approve and implement the New York state canal recreationway plan submitted pursuant to section one hundred thirty-eight-c of the canal law. The subsidiary corporation's review and approval of the canal recreationway plan shall be based upon its consideration of a generic environmental impact statement prepared by the subsidiary corporation in accordance with article eight of the environmental conservation law and the regulations thereunder. Prior to the implementation of any substantial improvement by the corporation on canal lands, canal terminals or canal terminal lands, or the lease of canal lands, canal terminals or canal terminal lands for substantial commercial improvement, the corporation, in addition to any review taken pursuant to section 14.09 of the parks, recreation and historic preservation law, shall conduct a reconnaissance level survey within three thousand feet of such lands to be improved of the type, location and significance of historic buildings, sites and districts listed on, or which may be eligible, for the state or national registers of historic places. The findings of such survey shall be used to identify significant historical resources and to determine whether the proposed improvements are compatible with such historic buildings, sites and districts;

(n) enter on any lands, waters or premises for the purpose of making borings, soundings and surveys; and

(o) accept any gifts or any grant of funds or property from the federal government or from the state or any other federal or state public body or political subdivision or any other person and to comply with the terms and conditions thereof.

8. (a) The subsidiary corporation shall review the budget request submitted by the canal recreationway commission pursuant to section one hundred thirty-eight-b of the canal law.

(b) The subsidiary corporation, on or before the first day of November, nineteen hundred ninety-two and on or before the fifteenth day of September of each year thereafter, shall submit to the director of the budget a request for the expenditure of funds available from the New York state canal system development fund pursuant to section ninety-two-u of the state finance law or available from any other non-federal sources appropriated from the state treasury.

(c) In the event that the request submitted by the subsidiary corporation to the director of the budget differs from the request submitted by the commission to the subsidiary corporation, then the request submitted by the subsidiary corporation to the director of the budget shall specify the differences and shall set forth the reasons for such differences.

9. The subsidiary corporation shall review the recommendations of the canal recreationway commission concerning the future use of canal lands in the Adirondack park issued pursuant to section one hundred thirty-eight-b of the canal law, and shall report to the governor and the legislature not later than the first day of October, nineteen hundred ninety-four, identifying any property not needed for canal purposes that may be transferred to the department of environmental conservation.

10. The subsidiary corporation shall not have the power to issue bonds, notes or other obligations.

11. The subsidiary corporation may do any and all things necessary or convenient to carry out and exercise the powers given and granted by this section.

12. The authority and all other state officers, departments, boards, divisions, commissions, public authorities and public benefit corporations may render such services to the subsidiary corporation within their respective functions as may be requested by the subsidiary corporation.

13. Whenever any state political subdivision, municipality, commission, agency, officer, department, board, division or person is authorized and empowered for any of the purposes of this title to cooperate and enter into agreements with the authority, such state political subdivision, municipality, commission, agency, officer, department, board, division or person shall have the same authorization and power for any such purposes to cooperate and enter into agreements with the subsidiary corporation.

§ 383. Additional powers of the authority to finance certain projects in connection with the New York state canal system

1. (a) The authority is hereby authorized, as an additional corporate purpose thereof, to issue its bonds, notes and other obligations in conformity with applicable provisions of the uniform commercial code for purposes of financing the construction, reconstruction, development and improvement of the New York state canal system.

(b) The authority may issue bonds, notes or other obligations pursuant to paragraph (a) of this subdivision in an aggregate principal amount not exceeding sixty million dollars plus a principal amount of bonds, notes or other obligations issued (i) to fund any related debt service reserve fund, (ii) to provide capitalized interest for a period not exceeding six months, except that where the proceeds of such bonds, notes or other obligations are expended on a revenue-producing project, such period shall be that allowable under the United States internal revenue code of nineteen hundred eighty-six, as amended, in order to preserve the exclusion of interest on such bonds, notes or other obligations from federal

income taxation, and (iii) to provide fees and other charges and expenses, including underwriters' discounts, related to the issuance of such bonds, notes and other obligations and the maintenance of such reserves, all as determined by the authority, excluding bonds, notes and other obligations issued to refund outstanding bonds, notes and other obligations issued pursuant to this section.

(c) The authority, in addition to the bonds, notes and other obligations authorized pursuant to paragraph (b) of this subdivision, may issue bonds, notes or other obligations pursuant to paragraph (a) of this subdivision in an aggregate principal amount not exceeding ten million dollars for the purpose of funding capital construction and reconstruction projects on the New York state canal system which are deemed by the authority as necessary due to the existence of an emergency involving danger to life, safety or property which requires immediate action. Provided, however, that no such bonds, notes or other obligations shall be issued pursuant to this paragraph until the authority has exhausted its authorization pursuant to paragraph (b) of this subdivision.

(d) In computing the total principal amount of bonds, notes and other obligations that may at any time be issued for any purpose under this section, the amount of the bonds, notes or other obligations that constitutes interest under the United States internal revenue code of nineteen hundred eighty-six, as amended, shall be excluded.

2. All of the provisions of this title relating to bonds, notes and other obligations, which are not inconsistent with this section, shall apply to obligations authorized by this section, including but not limited to the power to issue renewal notes or refunding bonds thereof.

§ 384. Additional powers of the authority to undertake and finance certain transportation projects

1. (a) The authority is hereby authorized and directed, as an additional corporate purpose thereof, to enter into contracts or agreements with any private person or corporation or with the state or local governments or with other public corporations to finance, construct, reconstruct, improve or develop the following transportation projects subject to the limitations prescribed by this section: (i) the projects, or portions thereof, known as the inner harbor project and the intermodal transportation project located in Onondaga county, including but not limited to, the consolidation of the Syracuse canal terminal and the planning, design and construction of an intermodal transportation facility, provided, however, that prior to proceeding with the inner harbor project, the authority and the city of Syracuse shall enter into a memorandum of understanding regarding the undertaking of such project; (ii) the project, or portions thereof, known as the horizons waterfront development project generally located in and around Erie county; and (iii) the project, or portions thereof, known as the Stewart airport access project located in Orange county to provide direct access to Stewart international airport from interstate eighty-four in the vicinity of the airport. Notwithstanding the provisions of article VI-A and section one hundred thirty-eight-c of the canal law and paragraph (m) of subdivision seven of section three hundred eighty-two of this chapter, the New York state thruway authority, or the subsidiary corporation thereof, is authorized to enter into an agreement with the city of Syracuse for the leasing of the land comprising the inner harbor project in Onondaga county. Any projects for the construction, reconstruction or improvement of property or structures undertaken pursuant to this section shall be in full compliance with title thirteen of article twenty-seven of the environmental conservation law and shall be deemed public works for the purposes of section two hundred twenty of the labor law and section one hundred three of the general municipal law, except that any contracts let by the

authority for the construction, reconstruction or improvement of such projects shall be subject to section three hundred fifty-nine of this title. For the purposes of article fifteen-A of the executive law only, the authority shall be deemed a state agency as that term is used in such article and its contracts for such projects as provided in this article shall be deemed state contracts within the meaning set forth in such article.

(b) The authority is hereby authorized, as an additional corporate purpose thereof, to issue its bonds, notes and other obligations in conformity with applicable provisions of the uniform commercial code in a principal amount necessary to achieve purposes enumerated in paragraph (a) of this subdivision, including a principal amount necessary to provide capitalized interest for a period not to exceed six months subject to the limitations in subdivision three of this section. In computing the total principal amount of bonds, notes and other obligations that may at any time be issued for any purpose under this section, the amount of the outstanding bonds or notes that constitutes interest under the United States internal revenue code of nineteen hundred eighty-six, as amended to the effective date of this section, shall be excluded.

2. All of the provisions of this title, which are not inconsistent with the provisions of this section, shall apply to the projects and obligations authorized by this section, including but not limited to the power to issue renewal notes or refunding bonds.

3. The authority shall make available a total amount of moneys not exceeding fifty million dollars, exclusive of federal funds and any state and local moneys which may be available, for capital purposes and for the other purposes enumerated in this section. The fifty million dollar amount shall be distributed as follows: (a)(i) an amount not to exceed fifteen million dollars shall be made available for the project, or portions thereof, known as the inner harbor project located in Onondaga county including, but not limited to, dredging of inner harbor, reconstruction of harbor piers including but not

limited to site preparation, utility lines, and hard edging of the pier, marina development including the establishment of dock space, parking, hoists, and lifts, shoreline and west side harbor landscaping, gateway and finger park development, southern pier freighthouse rehabilitation, and the reconstruction of Solars Boulevard including design and construction, excavation, curbing, lighting and paving and infrastructure projects related thereto; (ii) an amount not to exceed five million dollars shall be made available for the project, or portions thereof, known as the intermodal transportation facility located in Onondaga county and infrastructure projects related thereto; (b) an amount not to exceed fifteen million dollars shall be made available to design, acquire real estate, construct, provide construction inspection and landscaping for the project, or portions thereof, known as the horizons waterfront development project generally located in and around Erie county, including but not limited to the relocation of portions of a one and one-half mile segment of state highway number one hundred twenty-nine, also known as River Road (NY 266), in the town of Tonawanda, Erie county between interstate one hundred ninety at the south Grand Island bridge to the city of Tonawanda line, and the redesign, consolidation and relocation of portions of the four mile segment of Fuhrmann Boulevard in the city of Buffalo between the United States coast guard station/lighthouse area and Union canal; and (c) an amount not to exceed fifteen million dollars shall be made available for the project, or portions thereof, known as the Stewart airport access project located in Orange county to provide direct access to Stewart international airport from interstate eighty-four in the vicinity of the airport.

§ 385. Additional powers of the authority to issue special dedicated highway and bridge trust fund bonds

1. (a) The authority is hereby authorized, as an additional corporate purpose thereof: (i) to enter into a dedicated highway and bridge trust fund cooperative agreement or agree-

ments with the commissioner of transportation for the financing by the authority of disbursements made by the state for any of the activities authorized pursuant to the provisions of section eighty-nine-b of the state finance law in any case where the expense thereof is paid in whole or in part by the state; and (ii) to issue use permits or leases to the department of transportation for projects financed by the authority of disbursements made by the state in accordance with the provisions of a dedicated highway and bridge trust fund cooperative agreement or agreements, provided that such projects are maintained and operated under the supervision of the department of transportation without cost to the New York state thruway authority for the full term of such agreement or agreements, and provided further that such use permit or lease shall be granted by the authority on a toll free basis. Provided, however, that at any time after April first, nineteen hundred ninety-five, no dedicated highway and bridge trust fund cooperative agreement with the commissioner of transportation pursuant to this section, nor any supplement thereto, need provide any conveyance of an interest in the property to the New York state thruway authority in connection with any obligations incurred pursuant to this section; and any such conveyance evidenced by a dedicated highway and bridge trust fund cooperative agreement before such date shall, consistent with the rights of holders of any such obligations incurred pursuant to this section, revert to the people of the state of New York by appropriate instrument or instruments, by quitclaim deed or otherwise, in confirmation of such reversion and any related use permits shall be voided.

(b) The authority is hereby authorized, as additional corporate purposes thereof solely upon the request of the director of the budget: (i) to issue special emergency highway and bridge trust fund bonds and notes for a term not to exceed thirty years and to incur obligations secured by the moneys appropriated from the dedicated highway and bridge trust fund established in section eighty-nine-b of the state finance law; (ii) to make available the proceeds in accordance with

instructions provided by the director of the budget from the sale of such special emergency highway and bridge trust fund bonds, notes or other obligations, net of all costs to the authority in connection therewith, for the purposes of financing all or a portion of the costs of activities for which moneys in the dedicated highway and bridge trust fund established in section eighty-nine-b of the state finance law are authorized to be utilized or for the financing of disbursements made by the state for the activities authorized pursuant to section eighty-nine-b of the state finance law; and (iii) to enter into agreements with the commissioner of transportation pursuant to section ten-e of the highway law with respect to financing for any activities authorized pursuant to section eighty-nine-b of the state finance law, or agreements with the commissioner of transportation pursuant to sections ten-f and ten-g of the highway law in connection with activities on state highways pursuant to these sections. The authority shall not issue any bonds or notes in an amount in excess of $2.930 billion, plus a principal amount of bonds or notes: (A) to fund capital reserve funds; (B) to provide capitalized interest; and, (C) to fund other costs of issuance. In computing for the purposes of this subdivision, the aggregate amount of indebtedness evidenced by bonds and notes of the authority issued pursuant to this section, there shall be excluded the amount of bonds or notes issued that would constitute interest under the United States Internal Revenue Code of 1986, as amended, and the amount of indebtedness issued to refund or otherwise repay bonds or notes.

(c) Such obligations shall be issued or incurred with the approval of the director of the budget and shall be special obligations of the authority secured by and payable solely out of amounts appropriated by the legislature as authorized pursuant to section eighty-nine-b of the state finance law without recourse against any other assets, revenues or funds of or other payments due to the authority. Upon payments of such appropriated amounts from the fund established pursuant to section eighty-nine-b of the state finance law to the account

of the authority, such funds may be pledged by the authority to secure its bonds, notes and other obligations authorized by paragraph (b) of this subdivision and shall be held free and clear of any claim by any person arising out of or in connection with articles twelve-A, thirteen-A and twenty-one of the tax law. Without limiting the generality of the foregoing and without limiting the rights and duties of the commissioner of taxation and finance under articles twelve-A, thirteen-A and twenty-one of the tax law, no taxpayer, or any other person, including the state, shall have any right or claim against the authority or any of its bondholders to any moneys appropriated and transferred from the dedicated highway and bridge trust fund established by section eighty-nine-b of the state finance law for or in respect of a refund, rebate, credit, reimbursement or other repayment of taxes paid under such articles of the tax law.

(d) The notes, bonds or other obligations of the authority authorized by this section shall not be a debt of the state and the state shall not be liable thereon, nor shall they be payable out of any funds other than those of the authority pledged therefor; and such bonds and notes shall contain on the face thereof a statement to such effect. In addition, any agreements entered into by the department of transportation pursuant to sections ten-e, ten-f and ten-g of the highway law or any other entity on behalf of the state to effect the implementation of any of the activities financed in whole or in part with proceeds of the obligations of the authority authorized in this section do not constitute or create a debt of the state, nor a contractual obligation in excess of the amounts appropriated therefor and the state has no continuing legal or moral obligation to appropriate money for payments due under such contracts.

(e) All of the provisions of this title relating to bonds and notes, which are not inconsistent with the provisions of this section, shall apply to obligations authorized by this section, including but not limited to the power to establish adequate

reserves therefor and to issue renewal notes or refunding bonds thereof, provided, however, that the authority shall be authorized to issue variable rate bonds or notes pursuant to this section only until June thirtieth, nineteen hundred ninety-six, after which date no bonds or notes issued by the authority pursuant to this section may have interest rates which vary, provided further that the expiration of such authority shall not affect any such bonds or notes issued prior to such date.

2. Not less than one hundred twenty days before the beginning of each state fiscal year, the chairman of the authority shall certify to the comptroller and to the director of the budget a schedule of anticipated cash requirements for such fiscal year pursuant to any agreements entered into by the authority with the commissioner of transportation pursuant to sections ten-e, ten-f and ten-g of the highway law. The amounts so certified shall constitute required dedicated highway and bridge trust fund cooperative agreement payments due pursuant to such agreements under sections ten-e, ten-f and ten-g of the highway law. The total amount so certified for such fiscal year shall be equal to the total amount of the debt service due or expected to be due during such fiscal year on obligations of the authority incurred pursuant to subdivision one of this section, including payments of interest and principal (including sinking fund payments), together with:

(a) the amount, if any, due to any provider of any insurance policy, letter of credit or other letter of enhancement or a related facility with respect to such obligations, representing payments made by it as provided in the applicable resolution or trust indenture as a result of any previous failure of the state to make any payment provided for in this section, including any related reasonable interest, fees or charges so provided;

(b) the amount, if any, required to restore any applicable reserve fund to the applicable reserve fund requirement to the extent any deficiency therein has resulted directly or indi-

rectly from failure by the state to make any payment provided for in this section;

(c) the amount, if any, required to be rebated to the United States to provide for continued exclusion from federal income taxation of interest on obligations of the authority; and

(d) the expenses of the establishment and continued operating expenses of the authority related to the financing of activities funded with the proceeds of obligations authorized by subdivision one of this section, including, but not limited to, trustees' fees, fees payable to providers of credit facilities, fees for issuing and paying agents, remarketing agents and dealers, legal counsel, financial or other advisors or consultants, independent auditors, rating agencies, transfer or information agents, the publication of advertisements and notices, surety arrangements, and printers' fees or charges incurred by the authority to comply with applicable federal and state securities and tax laws; and any other costs of issuance in excess of the amount provided therefor from the proceeds of the sale of such obligations, to the extent that any of the foregoing amounts or expenses are not to be paid from other resources available to the authority for such purpose.

3. The chairman of the authority may revise such certification at such times as shall be determined by the chairman; provided, however, that the chairman of the authority shall revise such certification not later than thirty days after the issuance of any obligations authorized pursuant to subdivision one of this section including refunding bonds, and affecting the cash requirements of the authority with respect to the obligations incurred pursuant to this section.

4. Such certification shall provide for payments on such dates as the authority and the director of the budget deems appropriate to ensure that sufficient funds will be available from the sources identified in this section to enable it to meet its current obligations with respect to those obligations incurred pursuant to this section as they become due.

5. Upon receipt of such certification, or any revision thereof, the comptroller shall pay such dedicated highway and bridge trust fund cooperative agreement payments to the authority in accordance with such certification, from the dedicated highway and bridge trust fund established by section eighty-nine-b of the state finance law. Such payments shall be made on or before the date specified in each certificate or within thirty days after such receipt, whichever is later, provided that all such amounts shall have been first appropriated by the state.

6. The agreement of the state contained in this section shall be deemed executory only to the extent of appropriations available for payments under this section and no liability on account of any such payment shall be incurred by the state beyond such appropriations. The state, acting through the director of the budget, and the authority may enter into, amend, modify, or rescind one or more agreements providing for the specific manner, timing, and amount of payments to be made under this section, but only in conformity with this section.

7. The authorization, sale and issuance of bonds, notes or other obligations pursuant to this section shall not be deemed an action as such term is defined in article eight of the environmental conservation law for the purposes of such article. Such exemption shall be strictly limited in its application to such financing activities of the authority and does not exempt the department of transportation or any other entity from compliance with such article.

8. The state of New York shall and hereby agrees to and does indemnify and save harmless the New York state thruway authority from and against any and all liability, loss, damage, interest, judgments and liens growing out of, and any and all costs and expenses (including, but not limited to, counsel fees and disbursements) arising out of or incurred in connection with any and all claims, demands, suits, actions or proceedings which may be made or brought against the New

York state thruway authority arising out of any determinations made or actions taken or omitted to be taken or compliance with any obligations under or pursuant to this section.

9. Nothing contained in this section shall be deemed to restrict the right of the state to amend, repeal, modify or otherwise alter statutes imposing or relating to any taxes or fees, including the taxes imposed pursuant to section two hundred eighty-four, articles thirteen-A and twenty-one of the tax law and fees imposed by section four hundred one of the vehicle and traffic law. The authority shall not include within any resolution, contract or agreement with holders of the bonds, notes and other obligations issued under this title any provision which provides that a default occurs as a result of the state exercising its right to amend, repeal, modify or otherwise alter any such taxes and fees.

10. Any resolution authorizing bonds, notes or other obligations shall reserve the right of the state, upon amendment of the New York state constitution allowing the issuance, or assumption, of bonds, notes or other obligations secured by revenues, which may include the revenues securing bonds, notes or other obligations of the authority, (i) to assume, in whole or in part, such bonds, notes or other obligations of the authority, (ii) to extinguish the existing lien of such resolution, and (iii) to substitute security for the bonds, notes, or other obligations of the authority, in each case only so long as such assumption, extinguishment or substitution is done in accordance with such resolution.

§ 386. Additional powers of the authority to issue special rail and aviation transportation bonds

1. The authority is hereby authorized, as an additional corporate purpose thereof to enter into service contracts, contracts, agreements, deeds, leases with the director of the budget, the commissioner of transportation, municipalities and others to provide for the financing by the authority of rail and aviation transportation projects as authorized by section fourteen-j of the transportation law.

2. The authority is hereby authorized, as an additional corporate purpose thereof, solely at the request of the director of the budget: a. to issue special rail and aviation transportation bonds, notes or other obligations in an aggregate principal amount not to exceed forty million dollars plus a principal amount of bonds, notes or other obligations issued (i) to fund any related debt service reserve fund, (ii) to provide capitalized interest and (iii) to provide fees and other charges and expenses, including but not limited to legal fees, underwriters' discounts, related to the issuance of such bonds, notes and other obligations and the maintenance of such reserves, all as determined by the authority, excluding bonds, notes or other obligations issued to refund outstanding bonds, notes or other obligations issued pursuant to this section. Such bonds, notes or other obligations may be issued for a term not to exceed thirty years and shall be secured by the moneys provided pursuant to a service contract, contract, lease or agreement entered into with the director of the budget, the commissioner of transportation, municipalities or others pursuant to subdivision one of this section for the purpose of financing activities pursuant to section fourteen-j of the transportation law, such service contract, contract, lease or agreement to provide for the payment of debt service, funding of necessary reserves and all other expenses of the authority as agreed to by the parties, provided, however, that such service contract, contract, lease or agreement shall provide that the obligation of the state to make such payments shall not constitute a debt of the state within the meaning of any constitutional or statutory provision and shall be deemed executory only to the extent of moneys made available to the state, and that no liability on account thereof shall be incurred by the state beyond the moneys available for the purpose thereof and that any obligation to make such payments shall be subject to annual appropriations by the legislature; to make available the proceeds net of all costs to the authority in connection therewith in accordance with such agreements or as authorized and directed by law for the purposes of financing

activities pursuant to and in conformance with section fourteen-j of the transportation law.

3. Such obligations shall be issued or incurred with the approval of the director of the budget and shall be special limited obligations of the authority secured by and payable solely out of amounts appropriated by the legislature for payments pursuant to a service contract, contract, lease or agreement authorized pursuant to subdivision one of this section and any other funds appropriated by the legislature to the authority therefor without recourse against any other assets, revenues or funds of or other payments due to the authority.

4. Such obligations shall contain on the face thereof a statement to the effect that they shall not be deemed to be an obligation of the state and that the state shall not be liable thereon.

5. All of the provisions of this title relating to bonds and notes, which are not inconsistent with the provisions of this section shall apply to obligations authorized by this section, including but not limited to the power to issue renewal notes or refunding bonds thereof, provided, however, that the authority shall be authorized to issue variable rate bonds or notes pursuant to this section only until June thirtieth, nineteen hundred ninety-four, after which date no bonds or notes issued by the authority pursuant to this section may have interest rates which vary, provided further that the expiration of such authority shall not affect any such bonds or notes issued prior to such date.

6. The authorization, sale and issuance of bonds, notes or other obligations pursuant to this section shall not be deemed an action as such term is defined in article eight of the environmental conservation law for the purposes of such article. Such exemption shall be strictly limited in its application to such financing activities of the authority and does not exempt the department of transportation or any other entity from compliance with such article.

7. The attorney general shall approve or disapprove of the form of any service contract, contract, lease or agreement authorized pursuant to this section.

§ 2827. Removal of authority members

Except as otherwise provided in this chapter, every member of every authority or commission heretofore or hereafter continued or created by this chapter, except ex-officio members, that is, members whose membership results by virtue of their incumbency of a public office, shall be removable by the public officer or public body which is empowered by this chapter to appoint such authority or commission member, for inefficiency, neglect of duty or misconduct in office, provided, however, that such member shall be given a copy of the charges against him and an opportunity of being heard in person, or by counsel, in his defense upon not less that ten days' notice.

Supreme Court, U.S.
FILED
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CLERK

No. 96-381

In The

# Supreme Court of The United States

October Term, 1996

NEW YORK STATE THRUWAY AUTHORITY,

*Petitioner,*

- v.-

FRANK MANCUSO and ELLEN MANCUSO, Individually and on behalf of their children DEANNA and THERESA MANCUSO; F. MANCUSO BOATYARD, INC., d/b/a ECHO BAY MARINA,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is the Jurisprudence in *Hess v. Port Authority Trans-Hudson Corp.* in conflict with the jurisprudence applied in the Second Circuit?

2. Is there a legal conflict in the decisions of the other circuits which have applied *Hess* and would such conflict, if such exists, merit the granting of Certiorari under the circumstances of the present case?

3. Does the Court have jurisdiction to hear and decide the other facts and arguments presented in the petition if they were not made part of the record below?

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## COUNTER-STATEMENT OF THE CASE

The New York State Thruway Authority's (NYSTA) North Avenue Drain ("NAD"), which was originally constructed to drain only storm water from a small section of Interstate 95 through a large concrete culvert into the west branch of Echo Bay, part of Long Island Sound, is illegally connected to the City of New Rochelle's decrepit sanitary and storm sewage systems, resulting in the seepage, surcharge and discharge into Long Island Sound of raw, untreated sanitary sewage including petroleum, medical waste, human fecal matter and other noxious pollutants in violation, *inter alia,* of Subchapter IV, Chapter 26 of Title 33 of the United States Code, and 33 U.S.C. §§ 407, 441, 1311 and 1321. Respondents (Plaintiffs below), the family owners and operators of a small marina in the City of New Rochelle situated at the outfall of NAD, commenced this citizen lawsuit for injunctive relief against the Petitioner and the City of New Rochelle under the Federal Water Pollution Control Act, *33 U.S.C. 1251, et. seq.*, popularly referred to as the "Clean Water Act". Included in their complaint, pursuant to the District Court's supplemental jurisdiction *28 U.S. C. §1367,* were their claims for personal injury and private property damage. They lost their business and their health and are now penniless because NAD functions, with the knowledge and approval of NYSTA, as the overflow channel by which a decayed urban sanitary system by-passes an over capacitated treatment plant.

Procedural circumstances which render the Petition moot

In its answer to the complaint, NYSTA never interposed the Eleventh Amendment as an affirmative defense, but rather raised it for the first time in a summary judgement motion. The City of New Rochelle in its pleading interposed a cross claim against NYSTA, to which NYSTA never replied, objected or moved. The District Court (Brieant, D.J.), denied the defendants' summary judgement motions, and, as to NYSTA, held that a federal lawsuit could properly be brought for prospective injunctive relief of a continuing violation of federal law, despite any claim of Eleventh Amendment immunity, under the holding of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The District Court also found that, in any event, NYSTA was not the State of New York nor an "arm of the state", and was therefore not immune from prosecution in federal Court under the Eleventh Amendment.

NYSTA never appealed from that part of the District Court's finding of jurisdiction under *Ex Parte Young*, nor from the Court's exercise of supplemental jurisdiction, but only appealed so much of the District Court's ruling which found that it was not "an arm of the state" and not immune under the Eleventh Amendment. The Second Circuit (Oakes, Mahoney , Walker, C.J.), considering NYSTA's Appeal under the doctrine of the "collateral order exception", *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541 (1946); *Puerto Rico Aqueduct and Sewer Auth. V. Metcalf & Eddy, Inc.* 506 U.S. 139 (1993); *Komlosi v. New York State Office of Mental Retardation & Developmental Diabilities*, 64 F.3d 810 (2d Cir. 1995), carefully considered the legislative scheme by which NYSTA was engendered, as well as the New York State Constitution, which prohibited debts of NYSTA from becoming debts of the State of New York, and found that: (1) NYSTA, was a public corporation independent of the state both fiscally

and in terms of state oversight and control, (2) NYSTA was not an "arm of the state", and (3) the "dignity of the state" was not implicated in a federal lawsuit which sought injunctive relief and money damages from NYSTA for its admitted poisoning of the Long Island Sound.

In this Petition, the Attorney General again seeks the shield of Eleventh Amendment immunity, twice denied, to protect NYSTA from its admitted pollution, and attempts to create a conflict amongst Circuits, other than the Second Circuit, which have interpreted *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S.___, 130 L.Ed.2d 245, 115 S.Ct. 394 (1994). However, the Attorney General's "Statement of the Case" fails to alert the Court to the hopeless procedural dilemma which requires summary denial of the Petition: (1) no decision by this Court concerning Eleventh Amendment immunity will reverse the District Court's jurisdiction under *Ex Parte Young; (2)* no decision by this Court concerning Eleventh Amendment immunity will affect the District Court's exercise of supplemental jurisdiction under *28 U.S.C. §1367,* to which NYSTA neither imposed timely objection and from which it never appealed, and (3) no decision by this Court concerning Eleventh Amendment immunity will divest the District Court of its jurisdiction of the cross claims interposed without objection by the City of New Rochelle against NYSTA, jurisdiction to which NYSTA has submitted without any reservation in its pleading and from which it likewise never appealed. The full procedural circumstances of this case, which have been omitted from the Petition and which, due to NYSTA's failure to object and/or Appeal, would render any decision by this Court on the Petition moot or ineffectual, constitute misstatements which are hereby corrected pursuant to Rule 15 (2) of the Rules of this honorable Court.

The logical consequence of NYSTA's failure to object to the jurisdiction of the cross-claim, and its failure to Appeal the District Court's sustaining of supplemental jurisdiction under the authority of *Ex Parte Young*, will be that, despite any decision which this Court might wish to render concerning NYSTA's claim of Eleventh Amendment immunity from suit in federal Court, the District Court will continue to have jurisdiction over the Clean Water Act action. At most, a holding which finds that NYSTA is immune in this case would do nothing more than allow for the "splitting off" of the private causes of action, which would allow for the removal of the personal injury and property damage claims to New York's Court of Claims. This would not only require the same case to be tried twice in two different courts, but would also permit the New York Court of Claims to pass simultaneously upon matters of federal environmental law, matters more appropriately addressed in one proceeding in the District Court.

In the District Court, NYSTA also admitted, via its local Rule 3 (g) statements and/or its failure to respond to Requests For Admissions, that: (a) NYSTA owns NAD; (b) City has connections to NAD; (c ) NAD is a "point source" within the meaning of the Clean Water Act; (d) the discharge from NAD contains "pollutants" within the meaning of the Clean Water Act; (e) there is garbage, fecal waste, offal, medical waste being discharged through NAD; (f) that all point source discharges of pollutants are regulated and require a permit under the Clean Water Act; (g) none of the connections to NAD have permits, and (h) the unpermitted discharge of sanitary sewage pollutants from a point source is expressly prohibited under the Clean Water Act. The meek gloss which the Petition makes over the facts which led to this lawsuit does no justice in describing the filth and foul scum discharged each day from NAD, nor does it fairly depict the heinous nature of NYSTA's conduct in allowing such pollution to continue to the point where it ruined the

Plaintiffs' livelihood, rendered them destitute, caused personal and emotional injury and significantly degrades, even now, an ecologically fragile body of water used by millions of People in the northeastern United States.

Ironically, NYSTA is represented by the New York Attorney General's Environmental Protection Bureau, the very state agency designated by Federal Law to pursue and punish polluters. In ignoring the questionable procedural posture of this case, in failing to advise the Court of the full implication of his client's own admissions of guilt, and in attempting to create a non-existent and irrelevant "conflict" amongst the Circuits, the "People's Lawyer" wraps the wolf of a bogus argument in the fleece of a dumb sheep, and insidiously conceals the only real "conflict" in this case: that of an Attorney General who, in defending an independent public corporation and admitted polluter, has refused to take any action to protect the People and stop the spewing of the filth and scum discharged every day from NAD. It is in this factual context, one either ignored or not fully elucidated by the Attorney General in his "Statement of the Case", that this disingenuous and ill reasoned Petition should be judged.

## SUMMARY OF ARGUMENT

Besides the procedural circumstances, described above, which virtually render NYSTA's claim of Eleventh Amendment immunity moot, the petition for a writ of certiorari should also be denied for the following additional reasons:

1. The Eleventh Amendment jurisprudence applied by the Second Circuit to this case is neither "unsettled" nor "confused", and has been clearly established by the Court in

*Hess v. Port Authority Trans-Hudson Corp.* __U.S.__, 115 S.Ct. 394, 130 L.Ed. 2d 245 (1994) and *Lake Country Estates, Inc. v. Lake Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) and *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1974).

2. There is no "conflict" among the Circuits concerning the Eleventh Amendment jurisprudence applied in this case. Any "difference of approach" that NYSTA urges this Court to find between that taken by the Second Circuit in this case, and that taken by the Fourth Circuit in *Thiel v. State Bar of Wisconsin*, __F.3d __, No. 95-3442, 1996 WL 496629 and/or that taken by the Fourth Circuit in *Ristow v. South Carolina Port Authority*, 58 F.3d 1051 (4th Cir.), cert. denied __U.S.__, 116 S.Ct. 514, 133 L.Ed. 2d 423 (1995), is attributable solely to the unique fact patterns in each case, and is not based on any irreconcilable legal conflict in the Eleventh Amendment jurisprudence applied in this case.

3. The Court lacks jurisdiction to consider or decide the arguments and facts relating to "changes in state government structure", and "autonomy of organizing and financing public undertakings" because these matters were not made a part of the record below.

# I

## NEITHER THE JURISPRUDENCE IN *HESS* NOR THE JURISPRUDENCE APPLIED BY THE SECOND CIRCUIT IS IN CONFLICT

A- The Court's ruling in *Hess*, is clear and applies traditional Eleventh Amendment Jurisprudence

The Court's decision in *Hess*, which applied existing Eleventh Amendment jurisprudence to the New York/New Jersey Port Authority and found that it was not an "arm of the state" and not immune, is neither confusing nor unsettling. The Court first examined established jurisprudence with respect to the history and purpose of the Eleventh Amendment and restated the long accepted general principle that "(t)he Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity...It thus accords the States the respect owed them as members of the federation...", *supra.*, 513 U.S.__, 130 L.Ed.245, 255, 115 S.Ct.__. After reviewing the jurisprudence relating to Compact Clause entities, the Court reviewed the indicators for applying Eleventh Amendment immunity to a bistate entity which were established in *Lake Country*, and found that, where the indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being (i.e. state sovereignty and state dignity) are to remain the prime guide. The Court held that it was not at all disrespectful to call upon Compact Clause agencies to answer complaints in federal Court. Finding no threat to the states' dignity in a federal lawsuit, the Court, continued its inquiry and asked "...as *Lake Country* instructed, whether there is here 'good reason to believe' the States and Congress designed the Port Authority to enjoy Eleventh Amendment Immunity..."

In applying the "good reason to believe" standard the Court considered the "arm of the state" doctrine set forth in *Mt. Healthy* and examined the fundamental goal of the Eleventh Amendment, which is to shield the States' treasuries. The Court concluded, as New York State conceded in its *amicus curiae* brief, that the "vast majority of Circuits...have concluded that the state treasury factor is the most important factor to be considered...and, in practice, have generally accorded this factor dispositive weight..." *Hess, supra.* 130 L.Ed. 2d, 261. *Hess* therefore presented nothing new or unsettled, but rather considered the decisions of various Circuits and found that the "state treasury factor" was the most decisive element in determining whether or not an independent public corporation might still be considered as "an arm of the state" for the purposes of conferring Eleventh Amendment immunity.

The only thing new and unsettling is the Attorney General's mendacious attempt to back away from the concession made by his office in the *amicus curiae* brief in *Hess*, which confirmed the Attorney General's concurrence with the "state treasury" proposition. Besides this concession, the Attorney General has, in numerous state Court proceedings involving NYSTA, consistently argued that NYSTA is **not** the State of New York, but rather an independent corporation. The Environmental Protection Bureau does nothing to reconcile this hypocrisy in legal argument.

B- <u>The Second Circuit's decision is also based on traditional Eleventh Amendment jurisprudence and is not in conflict with *Hess*</u>

The Second Circuit's decision in this case carefully reviewed the statutory scheme by which NYSTA was created, and NYSTA's relationship to the State. The Court applied non-controversial Eleventh Amendment jurisprudence in an

appropriate manner and is not in conflict with *Hess*. Although *Hess* involved a bi-state compact entity, the Court observed that it nevertheless was the proper starting place for an Eleventh Amendment inquiry, citing: *Gray v. Laws*, 51 F.3d 426, 431 (4th Cir. 1995). The Court first examined the six factors identified in *Lake Country Estates, Inc. v. Lake Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), as derived from *Feeney v. Port Authority Trans-Hudson Corp.* 873 F.2d 628, 630-631 (2d Cir. 1989), *aff'd on other grounds*, 495 U.S. 391 (1979) and found them to be equally balanced in favor of and against a finding of immunity. The sixth factor considered, i.e. whether a judgement against NYSTA would place the state's treasury at risk, was found to weigh against immunity because of New York State's constitutional prohibition and statutes which specifically provided that NYSTA's debts were not the State's.

But the Second Circuit's inquiry did not end there. The Court then asked, as *Hess* requires, whether or not a judgement against NYSTA "would have the practical effect of requiring payments from the State", citing: *Ristow v. South Carolina Ports Auth.*, 58 F.3d 1051, 1053 (4th Cir. 1995). The Court held that:

> "(t)he Thruway Authority has provided no evidence that it would have any difficulty in satisfying a judgement in this case, or in any other. Instead, the Thruway Authority simply speculates that if the plaintiffs were to receive all the damages they claim ($105 million), its financial stability would be threatened. But this differs little from the Port Authority's unsubstantiated claim in *Hess* that a judgement against it would adversely impact the treasuries of New York and New Jersey...***The reality is***

> ***that the Thruway Authority is "structured [like] the Port Authority is, to be self sustaining"***...Thus, we have no difficulty in concluding that any judgment against the Thruway Authority in this case poses no threat to the finances of New York."

With the six *Feeney* factors in equipose, the Court then turned, as *Hess* requires, to the two long established purposes underlying the Eleventh Amendment-protection against state liability and respect for state sovereignty. Finding that the state treasury was "not even minimally at risk" the Court found that the sole question remaining was, as required by *Hess*, whether suit in federal Court would be an affront to the dignity of New York State. Contrary to NYSTA's assertion (Petition, p.9) that the Second Circuit "devalued" the Eleventh Amendment's concern with the "dignity of the state", the Second Circuit properly considered the issue and found that: (1) NYSTA had an existence quite independent from New York State and (2) New York State exercised, at most, minimal control over NYSTA, thus justifying the legal conclusion that the Eleventh Amendment's concerns of state sovereignty and dignity were not implicated. The Court then held that:

> " the state sovereignty concern weighs neither in favor of nor against Eleventh Amendment immunity...*Although the Thruway Authority may be identified closely with the state, New York State has given the Thruway Authority an existence quite independent from the state and exercises minimal control over the Thruway Authority. We are unable to conclude that subjecting the Thruway Authority to suit in federal Court would be an affront to the dignity of New York.* Because the concern for state

> liability weighs against the finding of immunity and *because the concerns of state sovereignty and dignity are not fully implicated,* we hold that the Thruway Authority is not entitled to Eleventh Amendment immunity."

Therefore, any claim that either the ruling in *Hess* or the decision in this case sows "conflict" by not properly addressing or "devaluing" established jurisprudence concerning the states "sovereign dignity" is belied by a specific negative finding.

The dignity of any state is derived from the dignity of the People of that state. It is the People who, in constituting the state, in consenting to be taxed and to be governed by representatives which they elect, confer the state with dignity and sovereignty. NYSTA is not the State of New York. It is a completely separate and independent public corporation whose officers are not elected by the People. Elected officials exercise the most minimal control over it. It has no authority to tax the People. Its treasury is independent of the State's and outside of the People's control. State constitutional provisions prevent the raising of the debt ceiling except by public referendum (N.Y.S. Constitution, Article VII, §11), and absolutely prohibit the debts of NYSTA (except the initial funding, which has long since been retired) from becoming the debts of the State (N.Y.S. Constitution, Art. 10, §5 & 6). NYSTA therefore derives no dignity or sovereignty from the People of the State of New York. No dignity of the State can be implicated where there is no legal or factual basis to hold that NYSTA is an "arm of the state". This is especially true where, under identical circumstances, the New York-New Jersey Port Authority, admittedly a bi-state compact agency, yet created under a statutory scheme almost identical to NYSTA, has already been found by this Court in *Hess* not to be an "arm of the state" and unable to partake in Eleventh Amendment immunity.

The Attorney General's nice recitation of past legislative enactments concerning NYSTA's independent financing of state infrastructure projects demonstrates nothing more than a cute pattern of legislative convenience. While NYSTA may be utilized as a discretionary vehicle to raise funds at the whimsy of the State's Legislature, its funding and liability have never been, and is prohibited from becoming, the legal responsibility of the State of New York. In choosing to create NYSTA as a separate public corporation the Legislature cut NYSTA free from the umbilical of the State and Eleventh Amendment immunity, which could have easily been retained by constituting it as a department of state government.

The arguments advanced in this Petition are diametrically opposed to the position which Attorney General has taken in all other recent lawsuits against NYSTA, in which the Attorney General has consistently argued that NYSTA **is** an independent entity and **not** an "arm of the state", [ See: *Schulz v. New York*, 84 N.Y. 2d 231, 616 N.Y.S. 2d 343, 639 N.E. 2d 1140 (1994); *Mathewson v. New York State Thruway Authority*, 22 Misc. 2d 410, 196 N.Y.S. 2d 215, *reversed on other grounds*, 11 A.D. 2d 782, 204 N.Y.S. 2d 904, *aff'd.* 9 N.Y. 2d 788, 215 N.Y.S. 2d 86, 174 NE 2d 754 (1961); *Bonaventure v. New York State Thruway Authority*, 108 A.D. 2d 1002, 485 N.Y.S. 2d 391 (3rd Dept. 1985); *MacFarland Breakell Bldg. Corp. v. New York State Thruway Authority*, 123 Misc. 2d 307, 472 N.Y.S. 2d 1004, *aff'd.* 104 A.D. 2d 139, 484 N.Y.S. 2d 166 (3rd Dept. 1984)]. Now that a completely opposite tack is expedient, the Attorney General takes a position completely controverted by prior admissions and contentions without so much as an intellectual blush. Such hypocrisy in legal argument, when considered in the light of an egregious conflict of interest, should lead this Court to deny the petition.

## II

## NO LEGAL "CONFLICT" IN THE DECISIONS OF THE OTHER CIRCUITS WHICH HAVE APPLIED *HESS* EXISTS, NOR WOULD ANY SUCH "CONFLICT" MERIT THE GRANTING OF CERTIORARI UNDER THE CIRCUMSTANCES PRESENTED IN THIS CASE

A- The Eleventh Amendment claim of immunity is moot in the procedural context of this case

The "conflict" between the circuits that the Attorney General would have his Court find do not merit the granting of certiorari here, because, assuming, *arguendo*, that NYSTA is immune, jurisdiction in the federal courts is still proper under the holding of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) and the unobjected to supplemental jurisdiction of the District Court, *28 U.S.C. § 1367*. Therefore, despite any claim of immunity, the federal Clean Water Act lawsuit will proceed on the basis of injunctive relief. Therefore, the District Court, under *Federal Rules of Civil Procedure, §§ 18, 19, 20 and 42*, and pursuant to the authority of *United Mine Workers of America v. Gibbs*, 86 S.Ct. 1130, 383 U.S. 715, 16 L.Ed. 2d 218 (1966), will have in any event properly exercised its supplemental jurisdiction over the private property damage and personal injury claims. Moreover, since NYSTA, in its pleadings, never responded to the cross-claim of the City of New Rochelle nor objected to the District Court's jurisdiction thereof, its Eleventh Amendment immunity claim is moot because such cross claim must now be decided in the context of the pending federal case. While the procedural circumstances alone merit the denial of this Petition, the Court will also find no real "conflict" in the jurisprudence applied by the various Circuits that relates to the facts in this case.

B- Any "conflict" among the Circuits concerning the Eleventh Amendment jurisprudence is fact specific and distinguishable

The alleged "conflict" between the Second Circuit's ruling in this case and *Hess* is at least partially belied by this Court's recent denial of certiorari in the Third Circuit decision in *Christy v. Pennsylvania Turnpike Com'n.*, 54 F.3d 1140 (3d Cir.) cert. denied, __U.S.__, 116 S.Ct. 340, 133 L.Ed.2d 238 (1995). The factors considered by the Third Circuit are the same as those established in *Lake Country*. The Third Circuit found that "prevention of federal Court judgements ... be paid out of the state's treasury" and "the vulnerability of the State's purse" to be the most salient factor in Eleventh Amendment determinations..." *supra., 1145,* a finding in complete accord with *Hess, Lake Country* and the Second Circuit's opinion in this case. The Court having denied certiorari in *Christy,* under legal circumstances almost identical to this case and those in *Hess,* is not now presented with any cogent new basis to grant certiorari here.

Reliance on a "conflict" asserted to exist as a result of the Seventh Circuit's decision in *Thiel v. State Bar of Wisconsin*, __F.3d __, (3d Cir., September 3, 1996) No. 95-3442, 1996 WL 496629 or the Fourth Circuit's decision in *Ristow v. South Carolina Port Authority*, 58 F.3d 1051 (4th Cir.), cert. denied __U.S.__, 116 S.Ct. 514, 133 L.Ed. 2d 423 (1995) is also illusory since, the decisions in each case were based on unique facts, not conflicting principles of constitutional law. These unique facts distinguish the reasoning and approaches applied by these two Circuits from the reasoning applied by the Second Circuit in this case.

In *Ristow* the Fourth Circuit found that the South Carolina legislature heavily supported its Ports Authority

through direct annual appropriations for the first seventeen years of its existence. South Carolina also issued general obligation bonds totaling $132 million and deposited the proceeds from those bond offerings in the Ports Authority's bank accounts. South Carolina also had the power to withdraw surplus revenues from the Ports Authority's account and deposit them in the general treasury. In addition, in connection with the establishment of a new BMW manufacturing plant, South Carolina transferred over $40 million from its treasury to the Ports Authority so that it could acquire the land on which to build the facility. The Court's holding in *Ristow* was based upon a specific factual finding of financial dependence: "All of this convinces us that, unlike Port Authority Trans-Hudson, the entity considered in *Hess*, the (South Carolina) Ports Authority is not self sufficient" (*Ristow*, supra., at 1053). Moreover, nothing in the Fourth Circuit's decision in *Ristow* overruled its holding in *Gray v. Laws*, 51 F.3d 426 (4th Cir. 1995) which ruled that the same factors identified in *Hess* as being relevant in a multistate agency context, *i.e.*, treasury and sovereignty concerns, extent of state control, state characterization of the entity and entity functions, are applicable to single state entities. Unlike the Ports Authority in *Ristow*, NYSTA is financially independent of the State of New York. Given the Fourth Circuit's holding in *Gray*, and the distinct factual finding of financial dependence made in *Ristow*, the "conflict" in the Fourth Circuit is bogus and no genuine basis to grant certiorari here.

Similarly, the "conflict" which NYSTA would have this Court find in the Seventh Circuit's decision in *Thiel v. State Bar of Wisconsin*, __F.3d __, No. 95-3442, 1996 WL 496629 (7th Cir. September 3, 1996) is also factually distinguishable. In *Thiel*, the Court considered whether or not the Wisconsin State Bar, which governed the conduct of lawyers and collected dues for purposes relating to their judicial supervision, and which was

administered and controlled by the Wisconsin Supreme Court, was immune under the Eleventh Amendment in a suit which was challenging Bar rules which had been approved by the Court. The Court, citing its earlier decision in *Crosetto v. State Bar of Wisconsin,* 12 F.3d 1396 (7th Cir. 1993) considered the question of "whether the State Bar ...is vested with sufficient state characteristics to qualify for sovereign immunity". The Seventh Circuit found that, because the Wisconsin Supreme Court exercised direct control over the State Bar, and because Wisconsin lawyers were officers of the Court subject to the supervision of the Wisconsin Supreme Court, the State Bar was an agent of the Wisconsin Supreme Court, an "arm of the state", and any "impact on the state treasury" was not a primary concern.

Reliance by the Attorney General on *Hadley v. North Arkansas Community Technical College,* 76 F.3d 1437, (8th Cir. 1996) petition for cert. filed 65 U.S.L.W. 3001 (June 24, 1996) (No. 95-2060), is also misplaced. There, the Eighth Circuit, confronted with the question of the immunity of local community college, with local political and financial involvement, held that "the resulting Eleventh amendment immunity questions tend to be difficult and very fact specific" (emphasis added). The Eighth Circuit found nothing inconsistent with the Court's reasoning in *Hess* and the test which it applied, *viz.* "(to) examine the particular entity in question and its power and characteristics as created by state law, to determine whether the suit in reality is a suit against the state", *supra. 1438.* Examining the Arkansas law which engendered and sustained the state's community college system, The Eighth Circuit found direct involvement by the voters of the state, direct state supervision, direct state funding and a statute which included this state institution in the state's obligation of financial support. Thus, the Eighth Circuit concluded that the community college in question was an "arm of the state" under

the traditional analysis required by *Mt. Healthy*. This analysis is identical to that applied by the Second Circuit in this case.

Unlike the Wisconsin State Bar in *Thiel*, NYSTA is clearly not an agent or arm of the state. Unlike the Ports Authority in *Ristow*, NYSTA is not financially dependent on the State's treasury. Unlike the community technical college in *Hadley*, NYSTA is neither directly supervised or funded by the State. Similar to the Port Authority of New York and New Jersey in *Hess*, NYSTA is neither controlled nor funded by the State, and its debts are not the debts of the State. The Court's rulings in *Hess*, *Lake Country* and *Mt. Healthy* inexorably led to the Second Circuit's finding that NYSTA was not an "arm of the state" but rather had an existence quite separate and apart from the state. Yet, even after the Second Circuit made this finding, it continued with the inquiry to determine whether or not the two purposes underlying the Eleventh Amendment, i.e. protection of the state's treasury and sovereignty, were implicated. The Court determined that: (t)he Thruway Authority ...is not a traditional state agency, but a public entity that is generally self-funded and, except for the appointment of its members to nine-year terms, it is not under significant state control." Because the Second Circuit specifically found that "concerns of state sovereignty and dignity are not fully implicated" , its decision was rationally based on both examination of the "state treasury factor" and examination of the "state dignity" factor. The decision is therefore not in conflict with *Hess* nor with the decisions of the Third, Fourth or Seventh Circuits, nor with the Eighth Circuit's decision in *Hadley*.

## III

## THE COURT LACKS JURISDICTION TO HEAR AND DECIDE THE OTHER FACTS AND ARGUMENTS PRESENTED IN THE PETITION BECAUSE THEY WERE NOT MADE A PART OF THE RECORD BELOW

Besides the procedural circumstances described in the Respondent's Counter-Statement of the Case, which render this Petition and the Court's jurisdiction most dubious, and to the extent that NYSTA argues that "accelerating changes in state governmental structure" or considerations of "autonomy of in organizing and financing" mandate granting of this writ, the Court also lacks jurisdiction to consider these issues because no record of these matters was made below. To the extent that NYSTA argues that "the State relies on NYSTA as an integral component in the planning, financing and implementing of state-wide transportation facilities" such argument is not based on any matter in the record and, in any event, is specifically contradicted by the lower courts' finding that the State's dignity was not affronted by subjecting NYSTA, an independent public corporation not controlled by the State, not bound to the State's treasury, to a lawsuit in federal Court. The District Court's factual determination that NYSTA was not an "arm of the state", and the Second Circuit's affirmance, were based on a record devoid of the arguments and facts now advanced in the Petition. Factors not part of the record below are not properly before this Court and should not be considered in deciding this Petition.

## CONCLUSION

The dignity and sovereignty of each state derives from the dignity of the People of that state. NYSTA is constitutionally and statutorily independent of that dignity and sovereignty. NYSTA's admitted pollution in this case, now unchecked as a result of an irreconcilable conflict of interest, unconscionable inaction and illogical arguments, offends the People's dignity beyond any shield of immunity and creates an injustice so great that must surely make the United States Constitution weep. NYSTA should be permitted to stand trial in federal Court before the People and answer for its admitted injustice to the People. The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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